Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Petitioner,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States Court of Appeals for the Ninth Circuit have original jurisdiction over breach of contract claims against the Bonneville Power Administration?

2. Does 16 U.S.C. § 839f(e)(5), which requires that challenges to the validity of a Bonneville Power Administration administrative action be brought within 90 days from the date of such action, also apply as a 90-day statute of limitation to breach of contract, tort or inverse condemnation claims which might later arise out of that action, but which if and when they do arise will not challenge the validity of that action?

3. Are claims for breach of contract, inverse condemnation and tort, which arise out of the operation of an electric transmission line regulated by the Federal Regulatory Commission ("FERC"), but which do not challenge the legality, validity or the propriety of the line, or seek to regulate the line, access to it, or rates for electrical power flowing on it, the exclusive province of FERC and therefore preempted?

4. Does the filed rate doctrine bar the recovery of damages calculated with reference to the filed rate actually in effect from the date damage is first claimed until the date of trial?

PARTIES TO THE PROCEEDING

Petitioner:

Petitioner Transmission Agency of Northern California is a governmental agency, specifically a joint exercise of powers agency organized and existing under the laws of the State of California. Petitioner's members are the California cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara (now Silicon Valley Power), and Ukiah; the Sacramento Municipal Utility District; the Modesto Irrigation District, and the Turlock Irrigation District. The Plumas-Sierra Rural Electric Cooperative is an associate member of petitioner. Among petitioner's purposes is the provision of electric transmission facilities and services for the use of its members.

Respondents:

Respondents are set forth in the caption.

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Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of California Dated February 8, 2001 And Filed February 9, 2001 ..... 28a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit order amending and denying petition for rehearing and petition for rehearing en banc and amended opinion (App. A at 1a-27a) is reported at 295 F.3d 918. The District Court opinion (App. B at 28a-52a) is apparently unreported.

STATEMENT OF JURISDICTION

On July 8, 2002, the Ninth Circuit Court of Appeals entered its order amending opinion and denying petition for hearing and petition for rehearing en banc and amended opinion. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND JUDICIAL DOCTRINES INVOLVED

Federal statutes involved include the Federal Power Act, specifically 16 U.S.C. § 839f(e)(5) regarding judicial review of BPA administrative actions, and 28 U.S.C. § 1631 regarding transfers to cure want of jurisdiction. Also involved are the doctrines of federal preemption and the filed rate doctrine.

STATEMENT OF THE CASE

I. *Introduction*

In the Interim Interconnection Agreement and the Schedule and Coordination Agreement (the "Agreements") between the Transmission Agency of Northern California ("TANC") and the Bonneville Power Administration ("BPA"), PacifiCorp, and Portland General Electric Company ("Portland") (collectively the "Northwest Parties"), the parties agreed to design, build, operate and maintain an integrated electric transmission system capable of transferring 4800 megawatts ("MW") of power north to south across the California-Oregon border. The Northwest Parties promised to build and maintain their segment of this integrated system north of the California-Oregon border. TANC promised to build the California-Oregon Transmission Project (the "COTP") in California. When interconnected at the California-Oregon border, these two segments, together with two other transmission lines in California, would form a coordinated system having a north to south transfer capability of 4800 MW.

In reliance on the Northwest Parties' promises, TANC built the COTP.

For a time the Northwest Parties complied with the Agreements by building their portion of the integrated system north of the California-Oregon border and operating it in such a manner as to maintain the 4800 MW of transfer capability required under the Agreements. In 1998, however, the Northwest Parties breached the Agreements by failing to maintain 4800 MW of transfer capability. This failure resulted not from events beyond the Northwest Parties' control,

but from their voluntarily taking affirmative and deliberate steps to modify their portion of the integrated system so as to reduce the transfer capability of the integrated system to 4500 MW north to south at the California-Oregon border, while failing to upgrade their system or to take other measures to replace the 300 MW of capacity lost thereby. The modification consisted of interconnecting the Northwest Parties' portion of the integrated system north of the border with a new 300 MW capacity line (the "Alturas Intertie Project") built by Sierra Pacific Power Company ("Sierra Pacific") for delivery of power primarily into Nevada. This interconnection was not required by any statute, rule or regulation, or mandated by any governmental entity.

TANC therefore asserts a claim against the Northwest Parties for breach of the Agreements for their failure to maintain 4800 MW of transfer capacity.

TANC's claims against Sierra Pacific include claims for interference with the contractual relationship between TANC and the Northwest Parties and a claim for misrepresenting the purpose of the Alturas Intertie Project in order to obtain governmental permits and authorizations to construct and operate the Alturas Intertie Project.

TANC's inverse condemnation and other tort claims asserted against the Northwest Parties and BPA are for damage to and interference with the COTP and TANC's rights under the Agreements caused by operation of the Alturas Intertie Project. With respect to these claims, TANC is no different from any other owner of property or contract rights damaged or adversely affected by operation of the Alturas Intertie Project.

In this action TANC does not claim that the construction and operation of the Alturas Intertie Project were illegal or improper. Whether or not they were is not relevant to TANC's claims. This lawsuit does not involve issues regarding whether, how, when or under what constraints the Alturas Intertie Project should have been built or should be operated. For better or worse, the Alturas Intertie Project has been built and placed in operation.

TANC in this action does not challenge any order of the Federal Energy Regulatory Commission ("FERC"). It does not seek any ruling, judgment or order regarding or affecting the interconnection of transmission facilities, rates, terms or conditions of transmission services, the sale of power, or the design, operation, use or maintenance of the Alturas Intertie Project. It does not seek any relief which is the prerogative of FERC or any other agency. What TANC seeks is money damages, which FERC has no authority to award.

Apart from this action, none of TANC's causes of action has been determined by or even presented to any court or agency.

II. *Facts As Alleged*

In its first amended complaint TANC alleges as follows:

TANC is a joint exercise of powers agency organized and existing under the laws of the State of California. Among TANC's purposes is the provision of electric transmission facilities and services for the use of its members.

Sierra Pacific, PacifiCorp, and Portland are electric utilities. BPA is a federal power marketing administration that markets electric power from federal and non-federal hydroelectric projects.

TANC is a participant in, and the project manager of, the COTP, which is a 500 kV transmission project extending from the California-Oregon border to central California. TANC has invested over $400 million in the COTP which became operational in March 1993. The COTP, together with two other California transmission lines extending to the California-Oregon border and known as the Pacific AC Intertie ("PACI"), comprise the California-Oregon Intertie ("COI"). The Northwest Intertie consists of transmission facilities north of the California-Oregon border owned in part by the Northwest Parties, which interconnect to the COI at the California-Oregon border.

In 1991 TANC and the Northwest Parties entered into the Agreements, which, among other things, obligated the Northwest Parties to upgrade or reinforce the Northwest Intertie to accommodate and provide for 4800 MW of transfer capability north to south from the Northwest Intertie to the COI. The Northwest Parties did complete such upgrades and reinforcements, known as the Northwest Reinforcement Project, and the FERC adopted a final rating for the COI of 4800 MW north to south, and allocated 1/3 of this transfer capability to the COTP.

In the Agreements, the Northwest Parties represented, promised and agreed that they would: plan, design, cite, construct and operate transmission facilities north of the California-Oregon border capable of transferring 4800 MW of power to electric transmission lines in California, including 1600 MW of power to the COTP; construct, operate, and maintain transmission facilities north of the California-Oregon border so as to minimize the possibility and impact of a disturbance originating from said facilities which would reduce their operating transfer capabilities; and take those

measures required to maintain the capability to transfer 4800 MW of power from the Northwest Parties' transmission facilities north of the California-Oregon border to facilities south of the California-Oregon border of which the COTP is a part. In return, TANC represented, promised and agreed that it would construct the COTP with the capability to import 1600 MW of power, thereby increasing the capacity of transmission facilities south of the California-Oregon border to a matching 4800 MW north to south.

In the Agreements, the parties recited, represented and agreed that their plan and intent was to provide the facilities necessary to transfer 4800 MW at the California-Oregon border from the Northwest Parties' transmission facilities to transmission facilities south of the California-Oregon border including the COTP; that it was important that facilities north and south of the California-Oregon border be constructed and operated in a coordinated manner; and that the parties would construct, operate and maintain their facilities so as to maximize operating transfer capability to equal the greatest extent practicable the rated transfer capability of 4800 MW.

The Northwest Parties initially performed under the Agreements by designing, constructing and operating their facilities in such a manner that the Northwest Parties' facilities north of the California-Oregon border had the capability, absent events beyond their control, of exporting 4800 MW of power at the California-Oregon border as provided for in the Agreements. However, in December 1998 the Northwest Parties breached the Agreements, including their promise to maximize transfer capability to equal to the greatest extent practicable the rated transfer capability of 4800 MW, by failing to maintain 4800 MW of transfer capability between the Northwest Intertie and the COI.

At that time the Northwest Parties modified the Northwest Intertie in such a manner as to reduce the capacity of the integrated system at the California-Oregon to 4500 MW. This reduction resulted when the Northwest Parties allowed, agreed to and participated in the construction and operation of the Alturas Intertie Project.

The Alturas Intertie Project consists of an approximately 200-mile long, 345 kV transmission line which interconnects with the Northwest Intertie and extends across northeastern California terminating at Sierra Pacific's North Valley Road substation, north of Reno, Nevada. The majority of the Alturas Intertie Project transmission line is in California. The Alturas Intertie Project commenced operation on or about December 21, 1998, and has a rated transfer capability of 300 MW. Whenever power is transferred north to south to the Alturas Intertie Project, the capability of the Northwest Intertie to export power to California transmission facilities, including the COTP, is reduced on a MW for MW basis.[1]

TANC's first amended complaint alleges breach of the Agreements by the Northwest Parties, and interference by

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1. In footnote 6 of its Memorandum and Order, the District Court noted that

> the parties agree that when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the [COI] is reduced by the amount delivered to the Alturas Intertie. Thus, if the Alturas Intertie is operated at its full transmission capacity of 300 MW, the [COI] can simultaneously receive only up to 4500 MW, 300 MW less than its 4800 MW transfer capability. App. B at 31a.

Sierra Pacific with the contractual relationship between TANC and the Northwest Parties and with TANC's prospective economic advantage.

In its claim for inverse condemnation against all defendants TANC alleges that the operation of the Alturas Intertie Project by the Northwest Parties and Sierra Pacific, each of which possesses the power of eminent domain, interferes with TANC's use and operation of the COTP, causes the loss of the transmission capacity and capability over the COTP specified in the Agreements, and exceeds the use which was represented to the California Public Utilities Commission in order to obtain a certificate of public convenience and necessity to construct and operate the Alturas Intertie Project.

In its cause of action for trespass against all defendants TANC alleges that the Alturas Intertie Project causes a measurable invasion and intrusion of current and flow onto the COTP.

In its cause of action for private nuisance against all defendants TANC alleges that the Alturas Intertie Project interferes with TANC's use and beneficial enjoyment of the COTP, such interference having occurred as a result of the physical invasion onto the COTP of electrical current and the reduction of capacity of the COTP.

In its cause of action for conversion against all defendants TANC alleges that by operation of the Alturas Intertie Project the Northwest Parties and BPA have converted the COTP and the capacity for which it was designed for their own use.

In its cause of action for intentional misrepresentation by Sierra Pacific, TANC alleges that Sierra Pacific obtained governmental permits and authorizations to construct and operate the Alturas Intertie Project by representing to governmental agencies and interested parties, including TANC, that the purpose of the Alturas Intertie Project was to provide emergency support to Sierra Pacific and to enable Sierra Pacific to make occasional economy purchases and sales, but not to purchase power to increase capacity. TANC further alleges that such representations were false in that the true purpose of the Alturas Intertie Project has always been, and is, to enable Sierra Pacific to make firm power purchases in order to increase its power capacity.

III. *The Proceedings In The District Court*

On February 5, 2001, respondents' motions to dismiss were heard by the Honorable William B. Shubb, United States District Judge. On February 9, 2001, the District Court entered its memorandum and order granting the respondents' motions to dismiss, thereby dismissing all of TANC's claims against all respondents. On February 9, 2001, judgment was entered in accordance with the District Court's order. On March 5, 2001, TANC filed its notice of appeal with the Ninth Circuit.

In dismissing TANC's claims against BPA, the District Court concluded that it was without jurisdiction to hear TANC's claim against BPA for breach of contract. The District Court concluded that TANC's breach of contract claims against BPA challenged agency action by BPA, and that therefore the Ninth Circuit Court of Appeals has exclusive jurisdiction over such claims. The District Court failed to address, apparently through inadvertence, TANC's inverse condemnation claim

against BPA, but dismissed it nonetheless. In dismissing TANC's claims against the remaining defendants, the Court ruled that all of TANC's claims are preempted by the Federal Power Act and the regulations issued pursuant to the Act by FERC.

IV. *The Proceedings In The Ninth Circuit Court Of Appeals*

The Ninth Circuit Court of Appeals affirmed the District Court's judgment. The Ninth Circuit filed its initial opinion on April 16, 2002. TANC timely petitioned for rehearing by the panel and for rehearing en banc. On July 8, 2002, the Ninth Circuit filed its order amending opinion and denying petition for rehearing and petition for rehearing en banc and its amended opinion.

The Ninth Circuit held: (1) that it has jurisdiction over TANC's breach of contract claims against BPA; (2) that transfer to another court would be futile because TANC's breach of contract claims against BPA were barred as of 90 days after BPA decided to interconnect with the Alturas line — despite the fact that BPA's decision to interconnect was made years *before* BPA breached its Agreements with TANC; (3) that all of TANC's claims are preempted simply because they arise out of the operation of an electric transmission line regulated by FERC; and (4) that the filed-rate doctrine bars recovery of damages because an award of such damages would necessarily involve speculation that FERC, but for the interconnection with the Alturas line, would have continued to allow a rating of 4800 MW on the parties' integrated system.

REASONS FOR GRANTING THE PETITION

I. *Introduction*

First, the Ninth Circuit held that it, and not the District Court or the Court Of Federal Claims, has jurisdiction over what is a pure and unadulterated breach of contract claim against BPA. This holding is unprecedented, is contrary to federal statute, and is in direct and complete conflict with the Ninth Circuit's own holding in *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988).

Second, the Ninth Circuit held th 16 U.S.C. § 839f(e)(5) operates as a 90-day statute of limitation, barring breach of contract and inverse condemnation claims against BPA years before the breach occurs, or the offending project giving rise to the inverse claim is even built. If this ruling stands, any party with a contract with BPA will be compelled to file a preemptive lawsuit within 90 days after BPA makes an administrative decision to take action which might, years later, give rise to a breach of that contract. This would be the case even when the BPA action would not itself constitute a breach of the contract. Likewise, the owner of property which might be adversely affected by a project which BPA decides to undertake would be compelled to file an inverse condemnation action years before the potentially offensive project is even built. Further, these preemptive lawsuits would be required even if there is no claim that the action undertaken by BPA is invalid, illegal or improper. No court has ever applied this statute in such a manner.

Third, the Ninth Circuit held, with no citation to any supporting authority, that "TANC cannot obtain state law money damages allegedly resulting from the operation of an

interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." App. at 15a. No court has ever applied the preemption doctrine in such a manner in the context of the transmission of electricity or of any other federally regulated industry.

To put this ruling in a more familiar context, this would be akin to ruling that an owner of property cannot obtain compensation for impairment resulting from the operation of an aircraft in a manner expressly approved by the FAA. All flight operations are expressly approved by the FAA, and the proposed manner of operation is not only contemplated, but studied extensively. Yet in thousands of instances, property owners have recovered damages under inverse condemnation and nuisance theories when airplanes fly overhead, albeit in perfect compliance with all FAA regulations.

Fourth, regarding the filed rate doctrine, the Ninth Circuit states that state law "may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." App. at 17a. Some courts have extended the filed rate doctrine so as to preclude recovery of damages calculated by reference to a rate which an agency might have, or should have, or would have approved, but did not. However, no court has ever remotely held, as the Ninth Circuit does here, that the filed rate doctrine precludes recovery of damages calculated by reference to an existing rate because the existing rate is subject to change, and therefore it is speculative to assume an agency would not change its rates. Further, even if the filed rate doctrine were stretched to so provide, even such an extreme application of the doctrine would not apply to

damages incurred prior to the date of trial. Those damages can be calculated by reference to the rate or rates actually in effect up to that point in time. Those rates are known as a matter of historical fact — no speculation or assumption is necessary.

The above holdings are literally unprecedented, and in each case diverge widely from, and conflict with, the many opinions which have issued on each of the above four questions. Further, all four matters are questions of exceptional importance on a national level, affecting not only the electric transmission industry, but all federally regulated commerce.

TANC, while respectful of the Ninth Circuit, believes that review of the above holdings is not only appropriate, but critically necessary. All four rulings are unprecedented and incorrect. Three are illogical. Two are contrary to statute. Two are directly contrary to decisions in other circuits. One is directly contrary to established case law in the Ninth Circuit itself. Two constitute substantial and unwarranted expansions of doctrines, the bounds of which have been well and carefully established through a multitude of cases in this Court and the various circuits. And one will cause the filing of likely hundreds of preventative, protective, premature and unnecessary lawsuits by wary parties in contract with BPA.

II. *Argument*

A. Contrary To Law Well Established By Statute And The Ninth Circuit Itself, And In Particular To *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988), The Ninth Circuit Has Ruled That It Has Original Jurisdiction Over A Breach Of Contract Claim Against BPA.

Taking TANC's allegations as true, the Ninth Circuit acknowledges that "[u]nder the Agreements [sued upon by TANC], the Northwest Parties agreed to upgrade from 3200 MW to 4800 MW an existing intertie that they own in Oregon, known as the Northwest AC Intertie", and that for a time "[t]he parties performed under the Agreements . . . ". App. at 3a-4a. TANC claims that the Northwest Parties, including BPA, breached the Agreements by failing to maintain 4800 MW of capacity at the California-Oregon border, even though no federal agency took any actions, directly or indirectly, which compelled a reduction. This is as pure and unadulterated a breach of contract claim as can be imagined. Under *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988) such a breach of contract claim is not a challenge to a final action or decision of BPA, and therefore the Ninth Circuit does not have original jurisdiction of such a claim. The Ninth Circuit's ruling is in direct conflict with its holding in *Public Utility District Number 1*.

The Ninth Circuit does have original jurisdiction over "[s]uits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by [BPA] . . ." 16 U.S.C. § 839f(e)(5). TANC has repeatedly stipulated that in this action it does not

challenge any action or decision by BPA. TANC does not claim that any action by BPA, including its participation in the Alturas Intertie Project, was unconstitutional, illegal, improper, unauthorized or unwise. Whether BPA's action was any of the above has no bearing whatsoever on the validity of TANC's breach of contract claims against BPA. Nor does TANC claim that BPA's decision to participate in the Alturas Intertie Project or its actual participation constitutes a breach of the Agreements. The Agreements do not prohibit or preclude such an intertie. The Ninth Circuit has exercised what Congress has not given it: jurisdiction over breach of contract claims against BPA.

The Ninth Circuit in *Public Utility District Number 1* held that a breach of contract claim such as TANC's is not a challenge to final actions or decisions of BPA. The Ninth Circuit's present decision is directly contrary to that holding.

The cases cited by the Ninth Circuit provide no precedents for its holding. In *Pacific Power and Light Company v. Bonneville Power Administration*, 795 F.2d 810 (9th Cir. 1986) the agreements at issue restricted the manner in which BPA could change the methodology for calculating average cost, a BPA rate-making activity authorized by, and indeed required by, federal statute, and subject to FERC review and approval. In this case, the Agreements do not restrict in any way whatsoever the manner in which BPA conducts activities which it is required or authorized by law to undertake. They do not prohibit BPA from participating in the Alturas Intertie Project, and they nowhere restrict interconnection with that project or any other system.

In *Central Montana Electric Power Co-op, Inc. v. BPA*, 840 F.2d 1472 (9th Cir. 1988), as the Ninth Circuit notes at App. at 10a, "the nature of the agency action being challenged by the Cooperatives [was] the Administrator's final action as to the marketing and allocation of electric power, a function that is governed extensively by the Northwest Power Planning Act. . . . Accordingly, the action is subject to our exclusive jurisdiction. . . . " TANC does not challenge BPA's marketing, allocation, rates, or any other action by BPA, including its participation in the Alturas Intertie Project. Indeed, in *Central Montana*, plaintiffs sought "a declaration holding that the electric power produced by the Libby project is reserved by statute primarily for use in the state of Montana." *Id.* at 1474. The court stated "[a]fter examining the relevant statutes and legislative history, we conclude that Congress has not established a Montana preference for Libby power." *Id.* at 1477. *Central Montana* was not a breach of contract case or even an ersatz breach of contract case. It was a declaratory relief action in which a declaration was sought regarding a claimed statutory right, not a private contract right.

B. In A Ruling Which Is Unprecedented, Incorrect, And Contrary To Statue, And Which Will Likely Spawn A Substantial Number Of Unnecessary Federal Lawsuits, The Ninth Circuit Has Transformed 16 U.S.C. § 839f(e)(5) From A Statute Of Limitation Governing Challenges To The Validity Of BPA Actions To A 90-Day Statute Of Limitation Governing All Claims Which Might Later Arise Even Indirectly Out Of That Action.

TANC asserts that BPA's failure to maintain 4800 MW of transfer capacity at the California-Oregon border constitutes a breach of the Agreements. TANC further asserts an inverse condemnation claim against BPA arising out of interference and loss of capacity caused by operation of the Alturas Intertie Project, a project in which BPA is a participant. The breach and interference first occurred in December 1998 when the Alturas Intertie Project became operational. TANC filed this action in December 1999.

In declining to transfer under 28 U.S.C. § 1631 TANC's claims against BPA, the Ninth Circuit held that TANC's claims were time barred by the 90-day limitation period in 16 U.S.C. § 839f(e)(5). App. at 13a. That section provides:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by [BPA], or the implementation of such final actions, whether brought pursuant to this chapter, the BPA Project Act [16 U.S.C.A. § 832 *et seq.*], the Act of August 31, 1964 (16 U.S.C. §§ 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. § 838 and following), shall be filed

> in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. . . . Suits challenging any other actions under this chapter shall be filed in the appropriate court.

The Ninth Circuit's construction of this statute is not only incorrect and unprecedented, but will almost certainly compel the filing of a substantial number of otherwise unnecessary lawsuits.

The holding is incorrect because the statute expressly applies to *challenges* to the constitutionality, legality and validity of BPA administrative actions. If such challenges are not made within 90 days, they are barred, and thereafter only actions which do not seek to invalidate, prohibit, limit or otherwise challenge actions or decisions of BPA may be brought.

However, the Ninth Circuit's holding is tantamount to ruling that if BPA makes an administrative decision to take an action which does not constitute a breach of contract between BPA and a third party, but *might* under certain circumstances cause a breach to occur years later, the third party must file a lawsuit in the Ninth Circuit within 90 days of BPA's administrative decision. Thus, the third party must file a "protective" or "preemptive" lawsuit potentially years before a breach occurs, if it ever does, rather than within four years thereafter. This is so even if the third party has no belief and makes no claim that BPA's action was illegal, improper, invalid, or wrong.

Also, the Ninth Circuit fails to explain how TANC has lost its inverse claim against BPA. Has the Ninth Circuit ruled that TANC must bring a claim for inverse condemnation years before the offending project is built? Most projects which give rise to inverse claims are perfectly legal and there is no basis or reason to file "preemptive" lawsuits challenging the administrative decisions to build them. Must a third party within 90 days file a lawsuit in the Ninth Circuit challenging a BPA administrative decision which if and when implemented might give rise to an inverse claim against BPA?

As far as TANC is aware, no court anywhere has ever applied this 90-day limitation period to breach of contract or inverse claims, and for good reason. Not only does such a ruling extend this statute far beyond its clear meaning, but it would encourage, and even compel, the filing of lawsuits the majority of which would never be filed but for this ruling.

C. In A Ruling That Is Unprecedented And Contrary To Well Established Case Law, The Ninth Circuit Has Applied The Preemption Doctrine To Bar Claims For Loss And Damage Caused By A Transmission Line Simply Because The Line Was Approved By FERC.

The Ninth Circuit, citing no supporting authority, states "TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval". This could not possibly be the law. The Ninth Circuit dismisses TANC's analogy to property owners who oppose an airport project and then seek to recover for interference caused by the project after it is built over their opposition. The Ninth

Circuit explains that "TANC is not a homeowner. It is an operator of an interconnected, federally regulated, interstate transmission system." App. at 16a. However, the Ninth Circuit does not explain why this matters. Is the Ninth Circuit saying that TANC is fair game, wholly without judicial redress, regardless of how severely its facilities are damaged by operation of the Alturas Intertie Project? If the Alturas line experienced a massive malfunction and destroyed or severely damaged TANC's lines, facilities, or buildings, would TANC have no ability to recover its damages in a court of law under any legal theory? No court has ever so held or intimated. Indeed, such a result would violate TANC's rights under the Fifth Amendment of the United States Constitution. Would FERC hold a trial and determine and award money damages in that situation? If not FERC, who?

The Ninth Circuit offered its own analogy:

> Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans.

Why can't the affected airline sue? The Ninth Circuit cites no authority which says it can't. The Ninth Circuit cites no authority at all for the above proposition. If the FAA approves changes in airline A's flight plans and as a result airline B's use of its hangar is restricted, or its proposed use of its airport property is restricted due to newly imposed building height restrictions, or the walls of its airport offices shake when airline A's planes fly overhead, why can't airline B, just like

any other property owner, seek monetary compensation? The Ninth Circuit cites no authority precluding such an action. Would the FAA hold a trial and determine and award just compensation? Does not the Fifth Amendment guarantee airline B's right to compensation?

D. Departing Substantially From Well Established Precedent, And Without Justification, The Ninth Circuit Has Broadened The Scope Of The Filed Rate Doctrine Far Beyond That Defined By A Substantial Body Of Case Law.

The Ninth Circuit concludes that TANC's contract related claims against the "utility defendants" are barred by the filed rate doctrine:

> All of TANC's contract-related claims depend upon the assumption that, but for the misdeeds of the utility company defendants, FERC would have continued to allocate 4800 MW of electricity capacity from the Northwest AC Intertie to the California-Oregon Intertie. This speculative assumption as to how FERC would have allocated electricity transmission capacity runs afoul of the filed rate doctrine.

App. at 17a.

The Ninth Circuit describes the filed rate doctrine as follows: "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." App. at 17a.

Some cases have held that the filed rate doctrine precludes a claim for damages measured by reference to a rate other than the rate actually adopted by the federal agency in question — in other words, by reference to a rate the agency could have/would have/should have adopted, but did not. The Ninth Circuit at App. at 17a-18a says that the filed rate doctrine will not allow a plaintiff "to assume a rate would be charged other than the rate adopted by the federal agency in question" (does this not imply that a plaintiff may assume that a rate would be charged that *is* the rate adopted by the federal agency?); that "the Supreme Court [has] held that a plaintiff in a case involving electricity rates set by the Federal Power Commission (the precursor to FERC) could claim no rate as a legal right that is other than the filed rate . . . " (does this not imply that a plaintiff could claim as a legal right the rate that *is* the filed rate?); and that "the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC" (does this not imply that a court could utilize a rate that is *not* different from that actually set by FERC?).

Here the "rate" actually approved by FERC is, and at all times since activation of the Alturas Intertie Project has been, 4800 MW. There is no need to speculate as to what "rate" FERC or anyone else could have/would have/should have approved. TANC's damages are measured by the shortfall between actual capacity as reduced by the effects of the Alturas line, and 4800 MW of capacity approved by FERC. TANC's damages can be determined with reference to the capacity rating of 4800 MW actually approved by FERC, not a hypothetical rate "different from" or "other than" this rating.

The Ninth Circuit, however, concluded that the filed rate doctrine bars TANC's claims because those claims depend on the speculation and assumption that "FERC would have continued to allocate 4800 MW of electricity transmission capacity from the Northwest AC intertie to the California-Oregon intertie." App. at 17a. While some cases have held that the filed rate doctrine precludes an award of damages based on speculation as to what rates an agency might have set, but did not, *no case has ever remotely held that the filed rate doctrine precludes the recovery of damages based on "speculation" that the agency would not change rates it has set.* Even the respondents, who have raised every defense imaginable, have not made this argument. This is a substantial and illogical expansion of the filed rate doctrine. One need not assume or hypothesize a 4800 MW transfer rating. To this day the interconnection *has* been rated at 4800 MW.

Even the filed rate doctrine as expanded by the Ninth Circuit would not apply to the period from the day the Alturas Intertie Project became operational to the day of trial. There is no need whatsoever to speculate or assume regarding the rated capacity during this period. It will be what it was. TANC's damages during this period in no way whatsoever will depend on speculation or assumption. They will depend on the actual rating during this period — something which will be known as an absolute, historical *fact*.

The Ninth Circuit says that "TANC cannot prove damages without assuming that FERC would have allocated 4800 MW to the California-Oregon Intertie". App. at 24a. This is simply not true. *At the time of trial both rated capacity and actual capacity from the time the AIP became operational until the time of trial will be known.* At a minimum, damages

suffered up to the date of trial can be determined by reference to the difference between those two known quantities. No speculation or assumption will be necessary.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 8, 2002

No. 01-15449

D.C. No. CV-00-01081-WBS

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Plaintiff-Appellant,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Defendants-Appellees.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
February 11, 2002 — San Francisco, California

Appendix A

Filed April 16, 2002
Amended July 8, 2002

Before: David R. Thompson, William A. Fletcher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Thompson

OPINION

THOMPSON, Circuit Judge:

The Transmission Agency of Northern California (TANC) is a joint exercise of powers agency composed of over a dozen Northern and Central California municipalities. It brought suit against the Bonneville Power Administration (BPA), a federal power marketing agency of the United States Department of Energy,[1] and the defendant regional utility companies. TANC asserted claims for equitable relief and damages allegedly incurred as a result of the BPA and the other defendants constructing, and interconnecting with, an electricity intertie known as the Alturas Intertie.

The district court did not reach the merits of TANC's claims. It dismissed the claims against the BPA for lack of subject matter jurisdiction, concluding that those claims

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1. The BPA markets power from federal and nonfederal hydroelectric projects, with a primary service area that includes California, Oregon, and Nevada. The BPA's transmission lines constitute approximately 80% of the Pacific Northwest's bulk transmission capacity.

challenged final agency action by the BPA and fell within the Ninth Circuit Court of Appeals' exclusive original jurisdiction. *See* 16 U.S.C. § 839f(e)(5). It also dismissed, as preempted under the Federal Power Act, 16 U.S.C. §§ 791-828c, TANC's claims against the defendant utility companies. TANC appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Facts and Proceedings

Because this case comes before us on appeal from a dismissal under Federal Rule of Civil Procedure 12(b)(6), all facts alleged in TANC's complaint are taken as true and construed in the light most favorable to it. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

TANC alleged that in 1991 it entered into an "Interim Interconnection Agreement" and "Schedule and Coordination Agreement" (collectively the "Agreements") with the defendants BPA, Portland General Electric, and PacifiCorp (collectively the "Northwest Parties") to jointly construct and operate an interconnection of two electricity interties. Under the Agreements, the Northwest Parties agreed to upgrade from 3200 MW to 4800 MW an existing intertie that they own in Oregon, known as the Northwest AC Intertie. TANC, in turn, agreed to construct a new 1600 MW line known as the California-Oregon Transmission Project. TANC also agreed to connect the California-Oregon Transmission Project to an already existing intertie in California, the 3200 MW Pacific

AC Intertie,[2] to form the 4800 MW California-Oregon Intertie. Finally, TANC and the Northwest Parties agreed to join the California-Oregon Intertie with the Northwest AC Intertie, creating a transfer capability of 4800 MW north-to-south at the California-Oregon Border between the two interties. The parties performed under the Agreements, and the Federal Energy Regulatory Commission (FERC) allocated to TANC's California-Oregon Transmission Project one-third of the newly-created transfer capability.

In 1996, the BPA announced its decision to join the Northwest AC Intertie with the new 300 MW Alturas Intertie, which was to be constructed by defendant Sierra Pacific. *See* Decision to Interconnect with Sierra Pacific Power Company's Alturas Transmission Line Project, 61 Fed. Reg. 7095 (Feb. 26, 1996). Sierra Pacific completed construction of the Alturas Intertie in late 1998.

The Alturas Intertie stretches from Nevada through northern California and into Oregon, where it connects with the Northwest AC Intertie. When operational, the Alturas Intertie causes a megawatt-for-megawatt reduction in the ability of the Northwest AC Intertie to deliver power to the California-Oregon Intertie. As a result, if the Alturas Intertie is operating at its maximum 300 MW capacity, then the California-Oregon Intertie has 300 MW of excess capacity.

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2. The Pacific AC Intertie is located south of the California-Oregon border and is owned by utilities not parties to this litigation. It was already connected to the Northwest AC Intertie, but that connection provided only 3200 MW of transfer capability.

Appendix A

Prior to the Alturas Intertie commencing operations, TANC (and other companies and instrumentalities not parties to this litigation) filed an unsuccessful protest with FERC, alleging that the Alturas Intertie would create a megawatt-for-megawatt reduction in the capacity of the California-Oregon Intertie. In that proceeding, TANC requested that FERC ensure that procedures were put in place to protect the "then-existing" contractual relationships, including the California-Oregon Intertie's alleged first-priority access to 4800 MW of transfer capability under the Agreements. Alternatively, TANC asked FERC to delay operation of the Alturas Intertie until either Congress approved the intertie, or the Northwest AC Intertie's capacity was increased to 5100 MW. FERC denied these requests and, on November 30, 1998, it approved operation of the Alturas Intertie. *See* 85 F.E.R.C. ¶ 61,314 (Nov. 30, 1998).

In February 1999, however, after operation of the Alturas Intertie had commenced, FERC initiated a hearing into the connection agreement creating the Alturas Intertie. FERC considered the hearing necessary to address allegations regarding the megawatt-for-megawatt reduction in the California Oregon Intertie's capacity, the inconsistency between the Alturas scheduling agreement and the California-Oregon Intertie's scheduling needs, and related issues.

Appendix A

Before the FERC case was resolved,[3] TANC filed the present lawsuit in December 1999 in California Superior Court against the BPA, Sierra Pacific, Portland General Electric, and PacifiCorp. As amended, TANC's complaint alleged breach of contract, tort, and property claims and requested legal and equitable relief. Specifically, TANC alleged that the reduction in capacity of transfers from the Northwest AC Intertie to the California-Oregon Intertie breached the Agreements and caused damage to the California-Oregon Transmission Project. TANC also asserted a fraud claim, alleging that Sierra Pacific had made misrepresentations before unspecified governmental agencies to obtain approval for the Alturas Intertie.

The BPA, a federal agency, exercised its right to remove the action to federal court, *see* 28 U.S.C. §§ 1442(a)(1), 1446(a), and the remaining defendants followed suit, asserting federal question and diversity jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. Once in federal court, the defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1),

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3. After the district court filed its opinion in this case, an administrative law judge released a decision in the ongoing FERC proceeding that is reported at *Sierra Pacific Power Co.*, 94 F.E.R.C. 63,019 (2001). Although that decision is still subject to further administrative and judicial review, and therefore not finally dispositive of any issue in the case, the existence of the ongoing litigation within FERC is an adjudicative fact relevant to this case. Federal Rules of Evidence 201(a), (b). Further, the existence of the opinion is not in dispute, nor are its contents. *Id.* Therefore, we take judicial notice of the entirety of 94 F.E.R.C. 63,019. *See* Fed. R. Evid. 201(c).This renders moot the parties' pending motions requesting that we take judicial notice of only select portions of that decision.

12(b)(6), and 19(b). TANC then voluntarily dismissed its tort claims against the BPA and its claims for equitable relief. The district court dismissed the remainder of TANC's claims under Rules 12(b)(1) and 12(b)(6). The court held that the claims against the BPA were subject to the exclusive original jurisdiction of this court under 16 U.S.C. § 839f(e)(5), and that TANC's claims against Sierra Pacific, PacifiCorp, and Portland General Electric were preempted by the Federal Power Act. This appeal followed.

II

Claims Against BPA

TANC raises two challenges to the district court's dismissal of its claims against the BPA. TANC contends that (1) the district court erred in holding that its claims were challenges to final agency action by the BPA and thus within the exclusive original jurisdiction of the Ninth Circuit Court of Appeals, and (2) even if the district court was correct that it lacked jurisdiction, instead of dismissing the claims, it should have transferred them under 28 U.S.C. § 1631 from the district court to this court or, alternatively, to the Court of Federal Claims. We are unpersuaded by TANC's arguments, and affirm the decision of the district court.

A

The district court ruled that it lacked subject matter jurisdiction over TANC's claims against the BPA because those claims were challenges to final agency action by the BPA over which this court has exclusive original jurisdiction under

section 9(e)(5) of the Northwest Power Planning Act, codified at 16 U.S.C. § 839f(e)(5). We review de novo the district court's conclusion that it lacks subject matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996).

Section 9(e)(5) of the Northwest Power Planning Act provides:

> Suits to challenge . . . final actions and decisions taken pursuant to this Act by the [Bonneville Power] Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this Act [or] the Bonneville Project Act . . . shall be filed in the United States court of appeals for the region. [Once the time for such challenges has passed,] [t]he plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this Act or any other law. Suits challenging any other actions under this Act shall be filed in the appropriate court.

TANC's remaining claims against the BPA are for breach of contract and inverse condemnation. TANC argues that these claims do not fall within this court's exclusive original jurisdiction because the claims are not challenges to any final administrative decision — an argument made with particular reference to the district court's decision that the claims against the BPA were ultimately challenges to the BPA's decision to join in the construction and operation of the Alturas Intertie. Rather, TANC argues, its claims fall under

the final sentence of section 9(e)(5) quoted above, establishing jurisdiction over any other claims in the appropriate court. We disagree.

"We have consistently interpreted [the section 9(e)(5)] judicial review provision 'with a broad view of this Court's jurisdiction and a narrow definition of district court jurisdiction.' " *Cent. Mont. Elec. Power Coop., Inc. v. Adm'r*, 840 F.2d 1472, 1475 (9th Cir. 1988) (quoting *Pacific Power and Light v. Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986)). In evaluating whether jurisdiction exists under section 9(e)(5), TANC's particular legal theories of breach of contract and inverse condemnation are not controlling. "It matters not that the [plaintiffs] attempt to base their theory of recovery in part outside of the Northwest Power Planning Act. In examining the nature of the agency action being challenged, our focus is 'on the agency being attacked and whether the factual basis for the attack is an agency action authorized by the Act.' " *Cent. Mont. Elec. Power*, 840 F.2d at 1476 (quoting *Pacific Power*, 795 F.2d at 816); *accord Forelaws on Bd. v. Johnson*, 709 F.2d 1310, 1313 (9th Cir. 1983).

In *Pacific Power*, we held that we had exclusive jurisdiction where declaratory relief against proposed agency rate-making was sought, even though the plaintiffs argued that they sought to challenge only the fact that the BPA's new rates breached prior contractual commitments. *Pacific Power*, 795 F.2d. at 815. We explained that "[a]lthough the utilities' action is based upon their contracts with BPA, the effect of their action would be to challenge BPA's ratemaking proceedings and the agency's obligation to undertake ratemaking in a manner consistent with its contractual commitments." *Id.* at 815-16.

Similarly, in *Central Montana Electric Power*, we rejected the argument of the plaintiff electrical cooperatives that we lacked exclusive original jurisdiction over a claim to a share of electric power because a portion of that claim rested on law and facts outside of the Northwest Power Planning Act. We explained that ultimately, "[t]he nature of the agency action being challenged by the Cooperatives [was] the Administrator's final action as to the marketing and allocation of electric power, a function that is governed extensively by the Northwest Power Planning Act. . . . Accordingly, the action is subject to our exclusive jurisdiction. . . ." *Cent. Mont. Elec. Power*, 840 F.2d at 1476 (citations omitted).

TANC's basic argument is that it is only challenging the BPA's failure to maintain 4800 MW of transfer capability between the Northwest AC Intertie and the California-Oregon Intertie. TANC contends this deprived it of electricity capacity for the California-Oregon Transmission Project[4] and violated the Agreements. TANC argues that it is irrelevant whether construction of the Alturas Intertie contributed to the deprivation and breach, because the BPA could have chosen to increase the overall capacity of the Northwest AC Intertie to 5100 MW and did not.

TANC relies upon *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988). There, the petitioner challenged several BPA actions, but it also alleged a breach

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4. We assume, without deciding, that a deprivation of electricity might support a claim for inverse condemnation under California law. *Cf. Harding v. State of Cal. ex rel. Dept. of Transp.*, 159 Cal. App. 3d 359, 364-67 (1984) (holding that a deprivation of light can support an inverse condemnation claim).

of contract claim based upon an oral contract it entered into with the BPA. We held that we lacked original jurisdiction over the breach of contract claim because "claims involving alleged contractual breaches by the agency and based on allegations of facts outside an administrative record must be heard in the claims court. . . . " *Id.* at 650. We distinguished previous breach of contract cases that reached a contrary result because in those cases the claims ultimately challenged final agency action by the BPA pursuant to its statutory authority. *Id.* at 649-50 (distinguishing *Pacific Power*, 795 F.2d. at 816). We explained: "In this case, however, the principal conduct of the agency on which petitioner's claim is based *is not final action taken pursuant to statutory authority*; it is alleged contractual commitments made outside the scope of any administrative record, and which petitioners contend have been breached." *Public Utility District Number 1*, 855 F.2d at 650 (emphasis added). Original jurisdiction over that case, therefore, lay in the claims court. *Id.* at 650-51.

Unlike the petitioner's claim in *Public Utility District Number 1*, TANC's inverse condemnation and breach of contract claims cannot be separated out from the BPA's final administrative decision.[5] In deciding to join the Northwest

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5. The parties devote much discussion to the administrative record component of the *Public Utility District Number 1* decision, as opposed to our holding that the oral contract claim was not a challenge to any final administrative decision. This is a plausible reading of *Public Utility District Number 1*, but not an accurate one. The key test under section 9(e)(5) is whether there is a challenge to a final administrative decision or its implementation, not the existence or adequacy of an administrative record. *See Cent. Mont. Elec. Power*,

(Cont'd)

AC Intertie with the Alturas Intertie without also making provision to increase the capacity of the Northwest AC Intertie, the BPA plainly decided to take an action that would deprive TANC of transmission capacity and that was inconsistent with the BPA's alleged contractual commitments to TANC. At that time, TANC could have filed a petition in this court under section 9(e)(5) to challenge the BPA's decision on these grounds. TANC did not file such a petition. It cannot raise the issue at this late date by clothing its challenge in state law claims. The root cause of the alleged inverse condemnation and breach of contract was the BPA's decision to join the Northwest AC Intertie to the Alturas Intertie, a final decision under section 9(e)(5) of the Northwest Power Planning Act. We alone have original jurisdiction over a challenge to that decision. *Cf. Pacific Power*, 795 F.2d at 815-16.

B

TANC requests that if we hold that the district court lacked jurisdiction over its claims against the BPA, we transfer those claims to this court. Under 28 U.S.C. § 1631, a federal court may transfer an action over which it lacks jurisdiction to another court that has jurisdiction. The district court denied this request, and so do we.

(Cont'd)

840 F.2d at 1476; *see also Puget Sound Energy, Inc. v. United States*, 47 Fed. Cl. 506, 512 (Fed. Ct. 2000). This is especially true where, as here, the asserted inadequacy of an administrative record regarding a key issue was caused by the plaintiff's failure to raise that issue in response to an administrative decision that clearly implicated the issue.

A transfer under § 1631 is inappropriate if the action would have been untimely had it been filed in the appropriate court. *Abbott v. United States*, 144 F.3d 1, 6 (1st Cir. 1998). Section 9(e)(5) of the Northwest Power Planning Act requires that suits challenging a final BPA action, or its implementation, be filed within ninety days of the BPA giving notice of the action in the Federal Register or of the action becoming final. 16 U.S.C. § 839f(e)(5). Here, the BPA announced its decision to interconnect the Northwest AC Intertie to the Alturas Intertie in February 1996. TANC's complaint was not filed until December 1999. Therefore, TANC's action challenging the BPA's final decision is untimely and transfer to this court is precluded. The district court correctly dismissed TANC's claims against the BPA for lack of subject matter jurisdiction.[6]

III

Claims Against The Utility Company Defendants

TANC also appeals the district court's dismissal, under Federal Rule of Civil Procedure 12(b)(6), of TANC's claims against the utility company defendants, Sierra Pacific, PacifiCorp, and Portland General Electric. The district court held that these claims were preempted by the Federal Power Act, 16 U.S.C. §§ 791-828c. "We review de novo both a dismissal for failure to state a claim under Rule 12(b)(6) and the district court's decision regarding preemption." *Nathan*

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6. Alternatively, TANC asks us to transfer this case to the Court of Federal Claims. Although it is true that court has jurisdiction over non-tort suits against the BPA, *see* 28 U.S.C. §§ 1346(a)(2), 1491, that jurisdiction only exists where we lack exclusive jurisdiction under section 9(e)(5). *Public Utility District Number 1*, 855 F.2d at 650.

Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1203 (9th Cir. 2002) (citing *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.), *cert. denied* 531 U.S. 929 (2000)).

Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, of the United States Constitution. Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoted in Branco v. UFCW-Northern Cal. Employers Joint Pension Plan*, 279 F.3d 1154, 1157 (9th Cir. 2002).

TANC asserts three categories of state law claims against the utility company defendants: (1) tort and property claims for inverse condemnation, nuisance, trespass, and conversion; (2) claims for breach of contract, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage; and (3) a fraud claim solely against Sierra Pacific. All of these claims are preempted by the Federal Power Act.

A

The conflict between federal law and TANC's state law tort and property claims is readily apparent. As the Supreme Court has explained, Part II of the Federal Power Act, codified at 16 U.S.C. §§ 824-824m, delegates to the Federal Energy Commission "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (emphasis added). Thus, as we have recently

explained, "FERC's exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001) (citing 16 U.S.C. § 824(b), (d)); *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1173 (9th Cir. 1997) ("Interstate transmission [of electricity] is clearly a federal matter.").

All of TANC's tort and property claims allege that the operation of the Alturas Intertie either damages, or trespasses on, the California-Oregon Transmission Project. FERC, however, approved the operation of the Alturas Intertie and its connection to the Northwest AC Intertie, thereby creating an interstate system for the transmission of electricity that stretches from Oregon through northern California and into Nevada. FERC alone has the authority to modify its decision pertaining to the Alturas Intertie, or to respond to challenges to the Intertie's operation. TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval *Cf. Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539-40 (7th Cir. 2001) (holding that a state commission may not interfere with an interconnection of interstate gas transmission lines once that interconnection has been approved by FERC).[7]

Unable to cite any case involving the interstate transmission of electricity (or a like commodity) where state law tort or

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7. Decisions under the Natural Gas Act and Federal Power Act are interchangeable. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

property claims challenging that transmission have been allowed to go forward notwithstanding federal approval of the transmission, TANC relies upon a string of airport cases where federal approval of flight plans did not preempt state law nuisance and noise violation claims. TANC then suggests the analogy that a homeowner would be equally free to file a state law nuisance claim regarding the operation of power lines, and that TANC is in a position akin to that of such a homeowner. This analogy relies upon a number of false premises, but we need only point out the most obvious one.

We may assume for the purpose of argument that a homeowner, in certain circumstances, might be able to pursue a state law tort or inverse condemnation claim challenging the operation of electricity transmission lines, in much the same way a homeowner might pursue a claim challenging airport noise. This does not mean, however, that TANC can do the same. TANC is not a homeowner. It is an operator of an interconnected, federally regulated, interstate transmission system. *See generally New York v. FERC*, __ U.S. __, 122 S. Ct. 1012, __, 2002 U.S. LEXIS 1380, at *11-15 (March 4, 2002) (describing the highly interconnected nature of the nation's electricity grids, including on the West Coast). Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for damages caused to its operations by the operations of another airline's FAA-approved flight plans. Not surprisingly, no aviation case nor any other authority supports such a proposition.

More to the point, what TANC seeks to achieve by its tort and property claims would defeat the entire purpose of exclusive federal regulation of interstate transmission of electricity. FERC has approved the construction and operation of the Alturas Intertie, and FERC alone (subject to court review of its final decision) can modify that decision, or deal with any party who operates the Alturas Intertie improperly. We conclude that TANC's state law tort and property claims against the utility company defendants are preempted. We next consider TANC's contract-related claims against these defendants.

B

All of TANC's contract-related claims depend upon the assumption that, but for the misdeeds of the utility company defendants, FERC would have continued to allocate 4800 MW of electricity transmission capacity from the Northwest AC Intertie to the California-Oregon Intertie. This speculative assumption as to how FERC would have allocated electricity transmission capacity runs afoul of the filed rate doctrine.

At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 862-63 (9th Cir. 1997). The doctrine applies to rates charged by railroads, *see Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), natural gas companies, *see Arkansas Louisiana Gas Co. v. Hall*, 453 U.S.

571 (1981), and other interstate operators over whom federal agencies have exclusive power to set rates. More relevant here, the Supreme Court has extended the doctrine to the Federal Power Act and to electricity rates.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), the Supreme Court held that a plaintiff in a case involving electricity rates set by the Federal Power Commission (the precursor to FERC) could "claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." The Court has explained that this rule is without exception: "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the Power Act by making [Federal Power Commission] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Fed. Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964), *quoted in Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

As further developed, the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC. In *Arkansas Louisiana Gas Co.*, 453 U.S. at 579, the Court stated:

> It would undermine the congressional scheme of uniform regulation of rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

The Court has also expanded the reach of the filed rate doctrine beyond just rates. In *Nantahala Power*, the Supreme Court held that "the filed rate doctrine is not limited to rates *per se*." 476 U.S. at 966. Instead, any allocation of power that directly affects rates is protected by the filed rate doctrine. *Id.* at 966-67. Thus, following *Nantahala Power*, we recognized that an allocation of natural gas approved by the Economic Regulatory Administration (ERA) is covered by the filed rate doctrine, just as if the allocation had been a decision on rates. *See County of Stanislaus*, 114 F.3d at 863-64 ("Plaintiffs' denial of access claims are, at core, a challenge to the quantity of gas that PG&E purchased from Canadian producers; because such quantities had received ERA approval and authorization, the claims cannot overcome the filed rate doctrine's clear instruction that ERA-approved volumes are conclusively reasonable.").

In *County of Stanislaus*, we noted that in *Nantahala* the Court had left open the possibility that a claim based on allocation might not be covered by the filed rate doctrine, if that allocation had not been set or approved by FERC or another federal agency. *County of Stanislaus*, 114 F.3d at 864. However, the reservation of this issue with regard to allocations

of interstate electricity transmission capacity is no longer appropriate because FERC's failure to address a specific allocation of electricity no longer invites the possibility that the filed rate doctrine might not apply. We reach this conclusion by giving deference to FERC Order No. 888, reported at 61 Fed. Reg. 21,540 (May 10, 1996).[8]

FERC Order No. 888 has functionally combined FERC regulation of rates with FERC regulation of transmission capacity. The Order accomplishes this because it regulates rates not by setting them directly, but rather by setting rules requiring open access to transmission lines at uniform, openly disclosed, rates. *See id.* at 21,541; *see also* 18 C.F.R. § 35.28 (implementing the nondiscriminatory open access transmission tariff policy). These open policies as to transmission capacity, FERC expects, will result in rates set at a competitive level. *See* 61 Fed. Reg. at 21,541. Thus, FERC's regulation of interstate rates now operates through FERC's regulation of open access to transmission capacity. For that reason, any right to a particular allocation of interstate transmission capacity must now be considered an exclusive matter of federal law. To conclude otherwise would restrict FERC's ability to regulate rates through its open transmission policy. We therefore hold that FERC's exclusive jurisdiction over the interstate transmission of electricity extends to any claims of entitlement

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8. In a case deciding several consolidated appeals, the D.C. Circuit upheld FERC Order No. 888; the Supreme Court granted certiorari on two issues not related to this appeal and issued an opinion affirming the D.C. Circuit and upholding FERC Order No. 888. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (per curiam), *aff'd sub. nom. New York v. FERC*, __ U.S. __, 122 S. Ct. 1012, 2002 U.S. LEXIS 1380 (March 4, 2002).

to a specific allocation of interstate transmission capacity, whether that claim asks a court to enforce such an alleged entitlement or merely to hypothetically assume it.[9]

In the present case, the common theme in TANC's claims against the utility company defendants for breach of contract, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage is the contention that TANC is, or would have been, entitled to 4800 MW of transfer capability between the Northwest AC Intertie and the California-Oregon Intertie. This contention stumbles upon the filed rate doctrine.

For a district or state court to conclude that under state contract law the Northwest Parties breached the Agreements — or that Sierra Pacific interfered with the Agreements or the prospective economic advantage related to those Agreements — by failing to increase the capacity of the Northwest AC Intertie to 5100 MW, the court would have to hold that under state contract law TANC was entitled to 4800 MW of transfer

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9. We have grounded our decision in the filed rate doctrine, despite the existence of separate FERC authority over transmission capacity, because no court has yet determined whether the rule against courts assuming hypothetical allocations of transmission capacity would apply if the hypothetical allocations of transmission capacity did not affect FERC-controlled rates. We note, however, that as the Supreme Court has recently explained, FERC's jurisdiction of electricity transmission, unlike its jurisdiction over sales (i.e. rates), can reach *intrastate* transmissions. *New York v. FERC*, 2002 U.S. LEXIS 1380, at *26-27. Hence, we reserve for future resolution the question whether federal law preempts claims that assume a hypothetical allocation of intrastate transmission capacity, notwithstanding FERC's lack of authority over intrastate sales.

capacity. Yet, state law can no more assume how FERC would allocate access to interstate transmission capacity than it can assume how FERC would set rates. *Cf. Arkansas Louisiana Gas Co.*, 453 U.S. at 579. This is true given both FERC Order No. 888 and FERC's express approval of the operation of the Alturas Intertie, with knowledge that its connection to the Northwest AC Intertie could impair the California-Oregon Intertie and the California-Oregon Transmission Project. Although this resolution may leave TANC's state law claims unredressed, such a circumstance is not an unlikely result of preemption. *Cf. id.* at 584 ("A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed.").

This same analysis undercuts TANC's reliance on a Fifth Circuit case, *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). There, the court held that claims regarding the quantity of electricity required under a contract were not preempted by the filed rate doctrine. *Id.* at 1472. However, in that case, the quantity to be purchased was not within the ambit of federal regulation. *Id.* In the present case, in light of FERC Order No. 888, the right to interstate transmission capacity access falls squarely within the area of exclusive federal regulation of rates.

We conclude that TANC's breach of contract and related claims against the utility company defendants are preempted by the Federal Power Act, 16 U.S.C. §§ 791-828c.

C

We turn now to TANC's fraud claim against Sierra Pacific. TANC alleges that Sierra Pacific committed the state law tort of intentional misrepresentation because Sierra Pacific:

> [O]btained governmental permits and authorizations to construct and operate the Alturas Intertie Project by representing to governmental agencies and interested parties, including plaintiff, that the purpose of the Alturas Intertie Project was to provide emergency support to Sierra Pacific and to enable Sierra Pacific to make occasional economy purchases and sales, but not to purchase power to increase capacity.

TANC does not specify in its complaint whether the alleged misrepresentations were made to FERC, the California Public Utilities Commission (PUC), or both. However, in its brief, TANC explains that "it believes the evidence is irrefutable that Sierra Pacific misrepresented its intentions regarding its use of the Alturas Intertie Project to the California Public Utilities Commission, and to those participants in the commission's proceedings." We therefore construe this claim as alleging misrepresentations in proceedings before the PUC.[10]

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10. If TANC's fraud claim were predicated on alleged misrepresentations before FERC, it would still be preempted based upon the reasoning that we apply *infra* to a claim alleging misrepresentations to the California PUC. We note that such a claim might also be preempted under *Buckman Co. v. Plaintiffs' Legal Commission*, 531 U.S. 341, 343-44 (2001) (holding that a state law fraud-on-the-Food and Drug Administration (FDA) claim is impliedly

(Cont'd)

If the alleged misrepresentations were made before the California PUC, then the predicate bad act occurred before a state agency, and federal law appears, at first glance, irrelevant. Yet, the problem with TANC's fraud claim remains the same as it is for its contract-related claims: TANC cannot prove damages without assuming that FERC would have allocated 4800 MW to the California-Oregon Intertie. Even assuming, without deciding, that the California PUC could have blocked construction of the Alturas Intertie, TANC's alleged "right" to 4800 MW, from which TANC derives its damages, violates the filed rate doctrine's prohibition on assuming hypothetical allocations of interstate transmission capacity.

We recognize that the Supreme Court has yet to resolve the issue of whether a claim based upon fraud before an agency can be preempted by the filed rate doctrine. *See Arkansas Louisiana Gas Co.*, 453 U.S. at 583 n.13. However, two circuits have concluded that filed rate preemption applies even where the claim is that a rate was procured by fraud. In a case where the fraud allegedly involved the state agency that approved the rate, the Eight Circuit held: "[T]he underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J., Inc. v.*

(Cont'd)

preempted by statutory scheme granting FDA power to punish and deter fraud), and *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204-07 (9th Cir. 2002) (holding that a state law claim that hinged upon the theory that the defendant made misrepresentations to the Environmental Protection Agency was preempted by a statutory scheme similar to that at issue in *Buckman*), but we need not decide that issue.

Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992). Because in that case the plaintiffs' fraud claim required that damages be measured by comparing the rates actually approved with those that allegedly should have been approved absent fraud, the court held that the filed rate doctrine barred the fraud claim. *Id.* at 488-92. Similarly, sitting en banc, the Eleventh Circuit in *Taffet v. Southern Co.*, 967 F.2d 1483, 1494-95 (11th Cir. 1992), held that an allegation that a filed rate was procured by fraud did not preclude application of the filed rate doctrine. We find these cases persuasive.

The impact of any award of damages to TANC for Sierra Pacific's alleged misrepresentation would be to undermine FERC's ability to regulate rates through its open access transmission policy. Such an award of damages would necessarily assume that, but for Sierra Pacific's alleged fraud, FERC would have made a specific allocation of electricity to TANC. *Cf. H.J., Inc.*, 954 F.2d at 489.

We conclude that TANC's fraud claim is preempted by the filed rate doctrine. We do not suggest, however, that in every case where FERC and a state utility commission have both approved a defendant's electricity intertie, a plaintiff could not possibly demonstrate damages from fraud committed before the state utility commission without implicating the filed rate doctrine.[11] Here, however, TANC

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11. We note that the California law does not recognize a state law equivalent of the filed rate doctrine. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 992-93 (9th Cir. 2000) (citing *Cellular Plus, Inc., v. Super. Ct.*, 14 Cal. App. 4th 1224 (1993)). Our decision, thus, is entirely based upon the effect of an award of damages on FERC's authority over interstate rates.

has failed to present a model of damages that does not impermissibly rely upon an assumption that FERC would have continued to allocate a certain amount of electricity transmission capacity to the California Oregon Intertie but for Sierra Pacific's misrepresentations.

IV

Conclusion

For the foregoing reasons, the district court's judgment is AFFIRMED.

Appendix A

ORDER

The opinion filed April 16, 2002 is amended as follows:

At slip opinion page 5765, in the first full paragraph, the fourth sentence that begins "TANC cannot obtain state law money damages . . . " is amended to read: "TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval."

At slip opinion page 5766, in the first full paragraph, the fifth sentence that begins "Offering an analogy of our own . . . " is amended to read: "Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans."

With these amendments, the panel named above has voted to deny the petition for rehearing. Judges W. Fletcher and Berzon have voted to deny the petition for rehearing en banc, and Judge Thompson has recommended denial of that petition.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on that petition.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED FEBRUARY 8, 2001 AND FILED FEBRUARY 9, 2001

NO. CIV. S-00-1081 WBS/DAD

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Plaintiff,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, PORTLAND GENERAL ELECTRIC COMPANY, and DOES 1 THROUGH 100, inclusive,

Defendants.

MEMORANDUM AND ORDER

This is a suit involving an interconnection of transmission facilities that is allegedly reducing plaintiff's electricity supply. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 19(b).

I. *Factual and Procedural Background*

Plaintiff TANC is a California joint powers agency which provides electrical transmission facilities and services for

the use of its members.[1] Defendants Sierra Pacific Power Company ("Sierra Pacific"), PacifiCorp, and Portland General Electric Company ("Portland") are investor-owned public utility companies.

Defendant Bonneville is a federal power marketing agency of the United States Department of Energy. Pursuant to the Bonneville Project Act, 16 U.S.C. § 832, *et seq.*, Bonneville is responsible for marketing power from the Federal Columbia River power system to the Pacific Northwest. *See* 16 U.S.C. §§ 823, 839a(14). Bonneville's transmission lines comprise approximately 800 of the bulk transmission capacity in the Pacific Northwest.

Defendants Bonneville, PacifiCorp and Portland (collectively "Northwest parties") are joint-owners of the "Northwest Intertie," which is comprised of transmission facilities north of the California-Oregon border. The Northwest Intertie is connected to the California-Oregon Intertie ("COI"), which is comprised of plaintiff's transmission line, known as the California-Oregon Transmission Project ("Transmission Project line"), and two other lines, known as the "Pacific AC Intertie."[2]

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1. TANC's members include the cities of Alameda, Briggs; Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara (now Silicon Valley Power), and Ukiah. TANC also serves the Sacramento Municipal Utility District, the Modesto Irrigation District, the Turlock Irrigation District, and the Plumas-Sierra Rural Electric Cooperative.

2. TANC owns 79% of the Transmission Project, and is the designated "project manager."

The Pacific AC Intertie is owned by three California-based public utilities: Pacific Gas & Electric Co., Southern California Edison, and San Diego Gas & Electric.

Appendix B

In 1991, Plaintiff entered into a written interconnection agreement with the Northwest parties ("COI interconnection agreement"), which provided for 4800 megawatts ("MW") of transfer capability from the Northwest Intertie to the California-Oregon Intertie.[3] Of that amount, 1600 MW (one-third) was designated for the Transmission Project line, serving Plaintiff's members, while the remaining 3200 MW (two-thirds) was designated for the Pacific AC Intertie.[4]

In December 1998, the Northwest parties connected the Northwest Intertie with Sierra Pacific's California transmission facility at Hilltop Substation, creating the "Alturas Intertie."[5] The Alturas Intertie provides service to Nevada and has 300 MW of transfer capability. Approximately 100 MW of that capacity is provided for two rural electric cooperatives in Nevada that are customers of Bonneville.

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3. Two agreements are related to the interconnection of the Northwest Intertie with the California-Oregon Intertie: the initial "COI interconnection agreement" and the corresponding "COI scheduling agreement."

4. Prior to construction of the Transmission project, the capacity of the Pacific AC Intertie was 3200 MW. When the project was built, the overall transfer capability of the entire transmission grid was increased by 1600 MW so that there would be no decrease in the transfer capability of the Pacific AC Intertie. The added capacity was the result of the Northwest Reinforcement Project, an enterprise led by Bonneville and PacifiCorp.

5. Two agreements between the Northwest parties and Sierra Pacific are related to the creation and operation of the Alturas Intertie: the initial "Alturas interconnection agreement" and the corresponding "Alturas scheduling agreement."

Appendix B

Plaintiff claims that the Alturas Intertie interferes with the transmission of power through the California-Oregon Intertie, and has reduced TANC's ability to receive its share of energy through the Transmission Project line.[6]

Plaintiff has filed a protest with the Federal Energy Regulatory Commission ("FERC"), which initially approved the Alturas Intertie by order dated November 30, 1998. Final briefs regarding plaintiff's protest were filed in September 2000, and FERC has yet to rule on the matter.[7]

Plaintiff filed this action on March 31, 2000, in California Superior Court, County of Sacramento, and defendants removed the action to this court. The first amended complaint alleges inverse condemnation, trespass, private nuisance, and conversion against all defendants; intentional misrepresentation and interference with contractual relations and prospective economic advantage against Sierra Pacific; and breach of contract against Bonneville, PacifiCorp, and Portland.

Defendant Bonneville, joined by Portland, moves to dismiss for lack of subject matter jurisdiction pursuant to

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6. The parties agree that when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the California-Oregon Intertie is reduced by the amount delivered to the Alturas Intertie. Thus, if the Alturas Intertie is operated at its full transmission capacity of 300 MW, the California-Oregon Intertie can only simultaneously receive up to 4500 MW, 300 MW less than its 4800 MW transfer capability.

7. During oral argument on February 5, 2001, counsel for Bonneville stated that he expects a ruling "in early spring."

Rule 12(b)(1). Bonneville argues in the alternative that plaintiff's tort claims are barred under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, because Plaintiff did not provide proper notice pursuant to 28 U.S.C. §2675(a).[8] During oral argument on February 5, 2001, plaintiff stated that it does not oppose dismissal of its tort claims on this ground. Thus, plaintiff's breach of contract claim is the only remaining claim for consideration against Bonneville.

Defendant Sierra Pacific, also joined by Portland, moves to dismiss on the grounds that plaintiff's claims are preempted by federal law, plaintiff cannot join an indispensable party, and the complaint fails to state a claim upon which relief can be granted. Fed: R. Civ. P. 12(b)(1), 19(b), & 12(b)(6).

II. *Bonneville's Motion to Dismiss*

Bonneville argues that under the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), 16 U.S.C. § 839, *et seq.*, the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction over plaintiff's claims against Bonneville.

The Ninth Circuit has held, pursuant to 16 U.S.C. § 839f(5), that it has original jurisdiction over suits challenging "final actions or other decisions by BPA [Bonneville Power Authority]

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8. Bonneville initially raised another alternative argument that under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Federal Claims Court has exclusive jurisdiction over plaintiff's breach of contract and inverse condemnation claims. However, Bonneville withdrew this argument in its reply brief.

. . . taken pursuant to tile Act's statutory authority."[9] *Pacific Power and Light Co. v. Bonneville Power Administration*, 795 F.2d. 810, 814 (9th Cir. 1986); 16 U.S.C. § 839f(5). The Act permits district court jurisdiction "only over 'other actions' which do not lie within [the Ninth Circuit's] exclusive jurisdiction." Pacific Power and Light, 795 F.2d at 814. "[T]he district court has no jurisdiction over challenges to BPA . . . actions under the Act." *Id.*

The Ninth Circuit's jurisdiction "does not turn on the legal theory underlying the lawsuit," but rather "the nature of the agency action at issue." *Central Montana Electric Power Cooperative, Inc. v. Administrator of the Bonneville Power Administration*, 840 F.2d 1472, 1476 (9th Cir. 1988). "The proper inquiry focuses on the agency being attacked and whether the factual basis for that attack is an agency action authorized by the Act." *Pacific Power and Light*, 795 F.2d at 816. Thus, the Ninth Circuit has exclusive jurisdiction here if the effect of TANC's action is to challenge a final action or decision by Bonneville pursuant to its statutory authority. *See id.* at 815 ("effect of [the plaintiff's] action would be to challenge BPA's ratemaking proceedings"); *Central Montana*, 840 F.2d at 1476 ("effect of [the plaintiff's] action is to challenge the BPA's power-marketing decision").

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9. Section 839f(5) provides that suits challenging "final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act[,] . . . or the Federal Columbia River Transmission System Act [,] . . . shall be filed in the United States District Court of Appeals for the region." 16 U.S.C. § 839f(5).

Appendix B

A. *Bonneville's Statutory Authority*

Bonneville argues that its participation in the Alturas Intertie is a final action or decision pursuant to the agency's statutory authority under the Bonneville Project Act, 16 U.S.C. §§ 832-832m, the Regional Preference Act, 16 U.S.C. §§ 837-837h, the Federal Columbia River Transmission System Act ("Transmission System Act"), 16 U.S.C. §§ 16 U.S.C. 838-838k, and the Northwest Power Act, 16 U.S.C. § 839, *et seq.*

The court accords substantial deference to Bonneville's interpretation of the statutes because it is the agency charged with their administration. *See* 16 U.S.C. § 832a(a)&(b); *Central Montana*, 840 F.2d at 1476; *Chevron U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ."). The court need only conclude that Bonneville's interpretation of the statutes is reasonable. *See Central Montana*, 840 F.2d at 1477 (quoting *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 422-23 (1983)).

The Bonneville Project Act provides for the distribution of electric energy generated by the "Bonneville Project," which is a federal hydro-electric power facility on the Columbia River.[10] The Act authorizes the Bonneville "Administrator," who is appointed by the Secretary of Energy, to "enter into

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10. The Bonneville Project includes the "dam, locks, power plant, and appurtenant works under construction on August 20, 1937." 16 U.S.C. § 832.

such contracts, agreements, and arrangements . . . in such a manner as [she] may deem necessary." 16 U.S.C. § 832a(f). The Act also authorizes and directs the Administrator

> to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as [she] finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and, for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal projects and publicly owned power systems constructed on or after August 20, 1937.

16 U.S.C. § 832a(b). Thus, the plain language of the Bonneville Project Act directs the Administrator to "provide, construct, operate, maintain, and improve" transmission lines for the purpose of transmitting available electric energy from the Bonneville project to "existing and potential markets." According to Bonneville, approximately 100 MW of the capacity in the Alturas Intertie is provided for existing Bonneville customers in Nevada. Bonneville also states that another purpose of the interconnection is to provide access to new markets for Bonneville's surplus power. Thus, Bonneville's interconnection with Sierra Pacific is pursuant to its authority under the Bonneville Project Act.

The Transmission System Act authorizes the construction of additions to the Federal transmission system within the Pacific Northwest region for the purpose of providing

"interregional transmission facilities." *See* 16 U.S.C. § 838b ("[T]he Administrator shall . . . construct additions to [the Federal transmission system] within the Pacific Northwest as [she] determines are appropriate and required to . . . provide interregional transmission facilities. . . .").[11] The definition

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11. Section 838b provides:

> [T]he Administrator shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as [she] determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units'
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities; or
>
> (d) maintain electrical stability and electrical reliability of the Federal system. . . .

16.U.S.C. § 838b. The Administrator may construct "customer service" facilities outside the Pacific Northwest, within contiguous areas that are (1) not in excess of seventy-five airline miles from the Pacific Northwest region, and (2) are served by a distribution cooperative that has no generating facilities, and serves areas both within and without the Pacific Northwest region. *Id.*

of the "Pacific Northwest" is found in the Northwest Power Act Pursuant to 16 U.S.C. § 839a(14), the "Pacific Northwest" means:

> (A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of Nevada, Utah and Wyoming as are within the Columbia River drainage basin; and (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on December 5, 1980 which has a distribution system from which it serves both within and without such region.

16 U.S.C. § 839a(14).

A map provided by Bonneville indicates that the agency constructed a transmission line from the Malin substation in Oregon to the Hilltop substation in California. The definition of the Pacific Northwest region does not include the state of California. However, the map shows that the Malin-Hilltop line is within seventy-five airline miles from the California-Oregon border.[12] Thus, Bonneville's interpretation that the Act authorizes the construction of a federal transmission line from Malin to the Hilltop substation is reasonable.

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12. According to Bonneville' s map, Alturas is approximately 35 airline miles from the California-Oregon border.

Moreover, section 839f(i)(3) of the Northwest Power Act mandates that the Administrator "shall furnish services including transmission . . . unless [she] determines such services cannot be furnished without substantial interference with . . . existing contractual obligations." 16 U.S.C. § 839f(i)(3). This provision speaks directly to Bonneville's obligation to provide transmission services in a manner consistent with existing contractual obligations.

Finally, Bonneville points to provisions requiring the agency to "make available to all utilities on a fair and non-discriminatory basis, any capacity in the Federal transmission system which [she] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States." 16 U.S.C. § 838d. The Regional Preference Act further provides:

> Any capacity in Federal Transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or *with any other area outside the Pacific Northwest,* which is not required for the transmission of Federal energy . . . *shall be made* available as a carrier for transmission of other electric energy between such areas.

16 U.S.C. § 837e.

In sum, the Bonneville Project Act, the Regional Preference Act, the Transmission System Act, and the Northwest Power Act all appear to authorize Bonneville's interconnection with Sierra Pacific and the creation of the

Alturas Intertie. Accordingly, Bonneville's interpretation of the relevant statutory provisions is reasonable and thus entitled to deference by the court.

B. *TANC's Challenge*

The Ninth Circuit has exclusive jurisdiction over TANC's claims against Bonneville if the claims effectively challenge Bonneville's participation in the Alturas Intertie. TANC has one remaining claim against Bonneville for breach of contract. TANC declares it is not claiming that Bonneville's participation in the Alturas Intertie is illegal or unauthorized. Rather, TANC's "primary concern" is Bonneville's alleged breach of the COI interconnection and scheduling agreements, and the resulting damage to TANC's property through interference with the operation of TANC's Transmission Project line. According to TANC, "[a] party to a contract who voluntarily takes affirmative and intentional action knowing that action will render that party incapable of performing under the contract is in breach whether or not the action was legal, proper, authorized or approved." (Opp'n to Bonneville's Motion at 5:14-17).

The plaintiffs in *Pacific Power* made a similar argument. *See Pacific Power*, 795 F.2d at 815. In that case, the Ninth Circuit upheld the district court's dismissal of the plaintiffs' breach of contract claim against Bonneville for lack of jurisdiction. *Id.* at 816. The plaintiff utility companies claimed that when Bonneville adopted a new cost methodology, it breached an agreement with the plaintiffs wherein Bonneville promised not to change its existing cost methodology for one year. *See id.* at 812-13. The plaintiffs argued that the district court had

jurisdiction because "the cause of action [was] grounded in contract law, not BPA's statutory authority under the Act." *Id.* at 815.

The district court, however, found that the contract issues were "interwoven" with Bonneville's consideration and approval of the new cost methodology. *See id.* at 813. Thus, the district court held its exercise of jurisdiction would necessarily impact the course of Bonneville's authority to adopt the new cost methodology. *Id.* The Ninth Circuit agreed, stating "[i]t is clear . . . that [section 839f(e)(5)] does not permit district court jurisdiction where the effect of an action is to challenge a BPA proceeding. . . . " *Id.* at 815. "Although the utilities' action [was] based upon their contracts with BPA, the effect of their action would be to challenge BPA's . . . obligation to undertake ratemaking in a manner consistent with contractual commitments." *Id.* at 815-16. ("What is crucial here is that the utilities are alleging that BPA's exercise of its authority under § 839c(c) to establish and average cost methodology is in breach of the agency's contractual obligations.").

Similarly, plaintiff here alleges that as a result of Bonneville's exercise of its authority to participate in the Alturas Intertie, Bonneville is in breach of a contractual obligation to maintain 4800 MW of transfer capability between the Northwest Intertie and the California-Oregon Intertie. Thus, plaintiff's claim, which is based on Bonneville's obligation to maintain 4800 MW of transfer capability, is interwoven with Bonneville's decision to interconnect with Sierra Pacific and provide transmission service through the Alturas Intertie.

Appendix B

Plaintiff relies on *Pub. Util. Dist. of Clark County v. Johnson*, 855 F.2d 647 (9th Cir. 1988), in which the Ninth Circuit held that it did not have jurisdiction over "claims involving alleged "contractual breaches by [Bonneville] and based on allegations of facts outside an administrative record." *Clark County*, 855 F.2d at 650.

In *Clark County*, the plaintiff alleged that Bonneville breached an oral or implied in fact contract, in which Bonneville agreed to purchase power from a particular facility. Plaintiff sued Bonneville after the agency issued an administrative decision stating that it would not purchase power from that facility. The Ninth Circuit reasoned that because the plaintiff's allegations were based on facts outside the scope of an administrative record, the [appellate] court was "particularly ill-equipped to hear" the plaintiff's claims. *See id.* at 649-50 ("[S]ection 839f(e)(1) expressly limits our review of final actions and decisions to the administrative record and incorporates the scope of review provision of the Administrative Procedure Act, 5 U.S.C. § 706.").

The present case is distinguishable from *Clark County*. Defendant notes that in deciding to execute the interconnection agreement with Sierra Pacific, Bonneville prepared a Record of Decision in accordance with various controlling regulations under the National Environmental Policy Act, and published the decision in the Federal Register. 61 Fed. Reg. at 7095 (1996). Thus, the action that forms the basis of the alleged breach is an agency decision supported by an Administrative Record.

The nature of the agency action challenged by plaintiff is Bonneville's operation of the Alturas Intertie. Bonneville's

construction of transmission facilities and the provision of transmission services is controlled by the agency's governing statutes. Because the issue of Bonneville's liability is interwoven with the agency's interconnection with Sierra Pacific and the operation of the Alturas Intertie, the exercise of jurisdiction by this court would necessarily impact Bonneville's authority to enter into such interconnection agreements. Even if jurisdiction is questionable, the Ninth Circuit "has consistently interpreted [section 839f(e)(5)] with a broad view of [the Ninth Circuit's] jurisdiction and a narrow definition of district court jurisdiction." *Id.* Accordingly, this court is without jurisdiction to hear plaintiff's claim against Bonneville for breach of contract.

Pursuant to 28 U.S.C. § 1631, the court may transfer plaintiff's case to the Ninth Circuit in lieu of dismissal. *See Bowers v. Jura*, 749 F. Supp. 1049, 1051 (W.D. Washington 1990). The interests of justice are better served here by dismissal. Plaintiff admits that its tort claims are defective in light of Plaintiff's failure to exhaust administrative remedies pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Dismissal would afford plaintiff the opportunity to reconsider how its pleadings should be framed in a different forum. Further, this court will not suggest how the Ninth Circuit should proceed by transferring plaintiff's action to that court.

III. *Sierra Pacific's Motion to Dismiss*

Sierra Pacific moves to dismiss on the ground that all of TANC's claims are preempted by the Federal Power Act of 1935 ("FPA"), 16 U.S.C. § 791a *et seq.*, and regulations issued in 1996 by the Federal Energy Regulatory Commission ("FERC").

Appendix B

Section 824 of the FPA provides for federal regulation of the transmission and sale of electric energy in interstate commerce. Subdivision (a) of section 824 declares that "the business of *transmitting and selling* electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824(a) (emphasis added). Subdivision (b) sets forth the boundaries of federal regulation as follows:

> The [Federal Energy Regulatory] Commission shall have jurisdiction over all facilities for such *transmission or sale* of electric energy, but shall not have jurisdiction, except as specifically provided [in the statute] over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.(Emphasis added.)

16 U.S.C. § 824(b)(1).[13]

Although. the quoted language from section 824(a) is worded in the conjunctive, the Second Circuit has held that the disjunctive language in section 824(b)(1) authorizes FERC to regulate the interstate transmission of electric energy, apart from sales of such power. *See Hartford Electric*

13. In 1992, Congress enacted the Energy Policy Act, which amended the FPA to authorize FERC to order utilities to "wheel" power, i.e. provide transmission service for wholesale power sellers over the utilities transmission lines on a case-by-case basis. *See* 16 U.S.C. §§ 824j-k.

Light Co. v. Federal Power Commission,[14] 131 F.2d 953, 965 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (explaining that exempting a corporation engaged in transmitting, but not selling, power would relieve it from both state and federal regulation, "a result which the legislative history shows to be in flat contradiction of the legislative purpose").

In April 1996, FERC issued Order 888, which was intended to increase competition among power suppliers and lower energy costs by requiring owners of transmission lines to open access to those lines. *See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 681-82 (D.C. Cir. 2000)(upholding Order 888 by determining, among other things, that its open access requirement does not unduly discriminate against existing utilities). The Order mandates what FERC calls "functional unbundling," i.e. the separation of utilities' wholesale transmission functions from their wholesale merchant functions. *Id.* at 682. Among other provisions, the Order requires all public utilities that own or operate facilities used for transmitting electric energy in interstate commerce to: (1) file an "Open Access Transmission Tariff" (or "OATT") that contains minimum terms and conditions for non-discriminatory services; (2) take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer to others; and (3) develop and maintain an "Open Access Same-Time Information System" ("OASIS") to give existing and potential transmission users the same access to transmission

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14. The Federal Power Commission, was the predecessor to the Federal Energy Regulatory Commission.

information as the utility itself. *See* Order 888, FERC Stats. & Regs. ¶ 31,036 at 31,635-36; (Def.'s Ex. B, Attached to Porter Decl.).

Sierra Pacific argues that, because FERC approved the Alturas Intertie in 1998, TANC's state law claims regarding that project are preempted by FERC's approval. Sierra-Pacific further contends that the underlying issues in this case already have been raised by TANC in its ongoing protests filed with FERC, and that TANC may not circumvent the federal regulatory process by repackaging its grievances as state tort and contract claims.

TANC argues that its lawsuit does not challenge FERC's approval of the Alturas Intertie, nor does it seek any ruling regarding the interconnection of transmission facilities or the sale of power.[15] Instead, TANC argues that it seeks only money damages, which FERC has no authority to award.

The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, holds that certain matters are of such national character that federal laws preempt or take precedence over state laws. *See Fidelity Federal Savings and Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 152 (1982). Congress may preempt state laws either expressly or by implication. *Id.* Implied preemption occurs when the scheme of federal regulation occupies the field or

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15. In its opposition to Sierra Pacific's motion, TANC dropped its claim for injunctive relief.

when state law would be inconsistent with federal law. *Id.* at 152-53. "Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983) (internal citations omitted). Federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings and Loan Ass'n*, 458 U.S. at 153.

Distilling the array of plaintiff's claims to their common core, TANC's grievance is that, since the Alturas Intertie was energized, it has lost first-priority access to all of the 1600 MW that had previously been available to it. According to TANC, it has pre-existing rights to this total capacity by virtue of its 1991 interconnection agreement with the Northwest parties.[16]

TANC, along with other California utilities, raised these same contentions in protests filed with FERC opposing the Alturas Intertie project. *See* 85 FERC 161,314 (1998), 1998 WL 822131; (Def.'s Ex. G, Attached to Porter Decl.). TANC's protest requested that FERC reject the Alturas Intertie agreement pending Congressional approval, the expansion of transfer capability of the Northwest Intertie, or the development of operating procedures to protect existing

16. These claims remain at the heart of TANC's complaint even though TANC states that it has dropped its request for injunctive relief.

systems that depend on the Northwest Intertie. 1998 WL 822131 at *3. FERC rejected TANC's request, noting that the Western Systems Coordinating Council ("WSCC"), which approved the 300 MW rating for the Alturas Intertie, had also established a task force to review the "operational impacts" of the project and resolve conflicting demands on the system. *Id.* at *4. FERC also emphasized that the commission has a procedure whereby a utility can seek relief from any burdensome "unauthorized loop flows." *Id.*[17]

TANC expanded on its initial arguments in a second protest, which asked FERC to suspend the agreements establishing the Alturas Intertie. *See* 86 FERC ¶ 61,198 (1999), 1999 WL 110058; (Def.'s Ex. J, Attached to Porter

17. The grievance procedure was established by Section 206(a) of the Federal Power Act. That section provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. § 824e(a). The District of Columbia Circuit Court cited this provision in holding that Order 888 was not unduly discriminatory. *See Transmission Access Policy Study Group*, 225 F.3a at 689.

Decl.). Specifically, TANC claimed that Sierra Pacific would become the beneficiary of a 300 MW "windfall" through the Alturas Intertie by "siphoning off" capacity that had been previously dedicated to California customers. 1999 WL 110058 at *5. TANC also contended that Sierra Pacific was using the open-access mandate of Order 888 as a shield to avoid an order by FERC specifying the rights of access for parties to the Transmission Project line. *Id.* TANC further argued that Sierra Pacific was seeking a "free ride" from those entities that upgraded the Northwest Intertie to ensure adequate import capability into California. *Id.*

In its order, FERC noted that none of the pleadings filed by TANC indicated that TANC had requested, and been denied, firm transmission service on the Northwest AC Intertie.[18] Further, according to FERC, "no party, including Bonneville, has indicated whether transmission capacity is available on the Northwest AC Intertie for use on a firm basis by the California Utilities." *Id.* at *13. However, FERC acknowledged that the California Independent System Operator ("ISO") had expressed concern that the proposed Alturas scheduling agreement lacked sufficient detail on "scheduling and curtailment procedures" and did not reflect any agreement among the affected parties. *Id.* Thus, the commission ordered a hearing to review the proposed Scheduling Agreement. *Id.* The commission also urged the parties to go before a settlement judge to resolve their differences, concluding:

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18. "Firm" transmission service entitles the recipient to priority access in exchange for the payment of a premium.

Appendix B

> In light of the approach we have taken in this case, we will deny the requests of the parties to summarily determine whether the California Utilities' prior usages of the COI [California-Oregon Intertie] and/or the Northwest AC Intertie create some form of entitlement to upstream transfer capability, and whether those entitlements, should they exist, are adversely impacted by the Scheduling and Interconnection Agreements. The parties may address these issues before the settlement judge and, if necessary, may present evidence thereon at the hearing.

Id. at *14.

According to portions of the administrative record provided to this court, a hearing on this matter was held before an administrative law judge, the parties have filed post-hearing briefs, and a decision is pending. (*See* Def.'s Exs. 9 & 10, Attached to Supplemental Request for Judicial Notice.). Because FERC is in the process of adjudicating the same basic issues raised by TANC in this action, the application of state law here would interfere with an ongoing regulatory process. The determination of plaintiff's claims concerning the alleged reduced capacity in the Transmission Project line could impose an "obstacle to the accomplishment and execution" of the interconnection and scheduling agreements currently under review by FERC. Plaintiff's claims are accordingly preempted by FERC's regulation of interstate transmission of electricity under the Federal Power Act, 16 U.S.C. § 824(b)(1).

Appendix B

To support its arguments against preemption, TANC relies heavily on *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In that case, the Fifth Circuit Court of Appeals held that a utility could assert state law claims against a seller for alleged harmed caused by contracts requiring it to purchase a certain amount of power.[19] *Id.* at 1471. The court recognized that any state law claims concerning rates were barred by the "filed rate doctrine," which prevents buyers or sellers of electricity from suing over rates filed with FERC. *Id.* at 1470. However, the court found that the plaintiff's claims were not preempted because setting aside a contract requiring minimum purchases of electricity would not necessarily interfere with FERC's rate-making powers under the FPA. *Id.* at 1472. Based on the court's reasoning in *Gulf States*, TANC argues that its state law claims are not preempted by the FPA or FERC because this action involves the capacity of transmission lines, not rates. Thus, according to TANC, the determination of plaintiff's claims does not interfere with FERC's regulatory authority.

TANC's argument based on *Gulf States* rests on the premise that preemption only occurs under the FPA and FERC's regulatory authority if a plaintiff's claims implicate rates. TANC's argument ignores the purpose of preemption. The pertinent question is not whether this action implicates FERC's rate-making powers, but rather, whether TANC's claims implicate any of FERC's regulatory powers under the FPA. Under the FPA, FERC regulates not only the sale of

19. Plaintiff claimed that the purchase requirements overloaded its transmission capacity, referred to as the "stuffing" of transmission lines.

electrical power, but also the interstate transmission of energy. Thus, unlike the plaintiff's claims in *Gulf States*, the determination of TANC's claims would interfere with FERC's regulatory authority.

Moreover, in *Gulf States*, the parties did not petition FERC for the resolution of their dispute. In the instant case, FERC has investigated plaintiff's concerns regarding reduced transfer capability as a result of the Alturas Intertie, and FERC's resolution of plaintiff's protest is still pending.

In addition, FERC has issued Order 888, which mandates open access to interstate power lines. As a result, Order 888 preemptsstate law claims based on diminished access to interstate transmission lines. No such concerns were present in the contract at issue in *Gulf States*.

In *County of Stanislaus v. Pacific Gas and Electric Co.*, 114 F.3d 858 (9th Cir. 1997), the Ninth Circuit considered claims that a utility's act of "stuffing" a pipeline with power for its so-called "core customers" violated antitrust laws by preventing a "non-core customer" from accessing the line. *See id.* at 860. The Ninth Circuit held that all federal and state antitrust claims raised by the County were preempted by FERC's approval of the purchase agreement which led to the alleged "stuffing" of the line. *Id.* at 864-66.[20]

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20. The Ninth Circuit relied in part on *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953 (1986). In that case, the Supreme Court held that the filed-rate doctrine is not limited to FERC decisions on rates "per se," but also to decisions that could indirectly affect rates by determining the amount of power that a utility may obtain. *Id.* at 966-67.

Here, TANC also contends that its access to energy has been thwarted-not by "stuffing," but by the diversion of 300 MW of transfer capability through the Alturas Intertie. Because the agreements establishing the Alturas Intertie are subject to approval by FERC, plaintiff's claims are preempted for the same reason that the County's claims were preempted in *County of Stanislaus*.

In sum, the court finds that all of TANC's claims are preempted by the Federal Power Act and the regulations issued pursuant to the Act by FERC. Accordingly, the court need not address Sierra Pacific's alternative grounds for dismissal.

IT IS THEREFORE ORDERED that defendants' motions to dismiss be, and the same hereby are, GRANTED.

DATED: February 8, 2001

s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

No. 02-529

Supreme Court of the United States

TRANSMISSION AGENCY OF
NORTHERN CALIFORNIA,

Petitioner,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE
POWER ADMINISTRATION, PACIFICORP and
PORTLAND GENERAL ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY SIERRA PACIFIC POWER COMPANY

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QUESTION PRESENTED

Respondent Sierra Pacific Power Company herein addresses Petitioner's Questions Presented Nos. 3 and 4. Those questions may be restated as a single question as follows:

> *Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, may California law be used to establish rights to use electrical transmission facilities in Oregon and Washington and to enforce those rights through the imposition of monetary damages on the transmitting utilities, when the Federal Power Act establishes exclusive federal jurisdiction over the transmission of electric energy in interstate commerce, 16 U.S.C. § 824 (2000); when the Federal Energy Regulatory Commission ("FERC") oversees access to the facilities in question; when the rights sought to be established under California law would conflict with rights established under FERC-approved tariffs; and when the monetary damages sought under California law would interfere with the operation of FERC-approved tariffs, would burden Nevada customers' access to federally-regulated electricity markets, and would penalize federally-regulated utilities for acting in accordance with federal law?*

CITATIONS TO THE DECISIONS BELOW

Transmission Agency of Northern California v. Sierra Pacific Power Co., 295 F.3d 918 (9th Cir. 2002) (cited herein as Appendix A to the petition for writ of certiorari).

Transmission Agency of Northern California v. Sierra Pacific Power Co., No. CIV S-00-1081 WBS/DAD (E.D. Cal., filed Feb. 9, 2001) (unreported) (cited herein as Appendix B to the petition for writ of certiorari).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Sup. Ct. R. 29.6, Sierra Pacific Power Company hereby states that it a wholly-owned subsidiary of Sierra Pacific Resources, which is an investor-owned corporation. No publicly-held company owns ten percent or more of Sierra Pacific Resources.

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SUMMARY OF ARGUMENT

The petition for writ of certiorari by Transmission Agency of Northern California ("TANC") fails to justify the Court's review of the determinations below. The petition asserts that this case raises an issue of national importance but fails to articulate that issue; the petition alleges but fails to identify a division among the circuit courts of appeal. Pet. 13. The petition seeks review merely to address alleged error below, based on theories that were resoundingly rejected below and that contradict well-established principles. Respondent Sierra Pacific Power Company ("Sierra Pacific") respectfully submits that the petition fails to warrant an exercise of the Court's discretion to grant a writ of certiorari and should be denied. *See* Sup. Ct. R. 10.

This case began with TANC's filing of a complaint under California law, in which TANC asserted a superior right for California versus Nevada customers to use the major electrical transmission system through Oregon and Washington (the "Northwest AC Intertie"). Pet. 7-8.

The United States District Court for the Eastern District of California dismissed TANC's complaint against Sierra Pacific on grounds of federal preemption, noting that the Federal Power Act establishes exclusive federal jurisdiction over the transmission of electric energy in interstate commerce and authorizes the Federal Energy Regulatory Commission ("FERC") to oversee the use of electrical transmission facilities in interstate commerce. Pet. App. B 42a-44a (citing 16 U.S.C. §§ 824, 824j, 824k (2000)). The Eastern District held that this federal scheme precludes the adjudication of TANC's alleged transmission rights under state law. *Id.* at 49a. The United States Court of Appeals for the Ninth Circuit affirmed, reasoning that TANC's claim of right to transmission capacity is a federal matter that must be resolved within the federal scheme. Pet. App. A 20a-22a.

The lower courts' determinations rest on numerous decisions by the Court that recognize the broad scope and preemptive effect of federal jurisdiction over the transmission of electric energy in interstate commerce, including, most recently, this Court's opinion in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 122 S. Ct. 1012 (2002). The lower courts' determinations also implicitly reflect the Court's decisions on the constitutional dimensions of federal jurisdiction in this area. Consistent with *Public Utility Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), it would be impermissible to use California law to resolve the rights of California versus Nevada customers to use electrical transmission facilities in Oregon and Washington and thereby to reach electricity markets in the Pacific Northwest. *Id.* at 90 (state regulation of wholesale sales of electricity in interstate commerce violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3).

Faced with clear federal jurisdiction over its claim of right to transmission capacity, TANC turns to the airline industry and offers an egregious mischaracterization of the law in that area. TANC notes that its complaint under California law seeks monetary damages rather than a direct reallocation of capacity. Then, referring to "thousands" of unidentified cases in the airline industry, TANC suggests that state law is routinely used to impose monetary damages on federally-regulated activities. Pet. 12, 19-20. As revealed by the actual case precedent, state law is used to award damages only with respect to activities that are left to local control. Pet. App. A at 15a-17a. Here, rather than implicating activities left to local control, TANC's claim of right to transmission capacity goes to the heart of the federal scheme governing transmission in interstate commerce and therefore must be resolved within the federal scheme. *Id.* at 20a-22a.

TANC also offers vague, unsupported and misplaced references to the Fifth Amendment of the United States Constitution, U.S. Const. amend. V. TANC asserts that the form of relief sought in TANC's complaint (monetary damages) falls outside the scope of remedies available from FERC. Pet. 4, 20. TANC then suggests that, if TANC is precluded from seeking monetary damages under California law, TANC will be deprived of compensation and judicial redress in violation of the Fifth Amendment. *Id.* at 20-21.

Under the proper analysis, the Fifth Amendment neither guarantees the availability of particular forms of relief nor negates the supremacy of federal law. TANC's proposed imposition of damages under California law would impermissibly conflict with federal law by enforcing a claim of right to transmission capacity that has not been recognized within the federal scheme. Pet. App. B 46a, n.16; Pet. App. A 20a-21a. Whether FERC may award the particular form of relief sought by TANC is inapposite. Because Congress has asserted comprehensive federal jurisdiction over transmission in interstate commerce, TANC may not, through its prayer for relief, convert transmission access into a matter for California law.

In fact, the federal scheme provides ample opportunity for TANC to pursue its grievance and ample recourse if TANC's rights have been impaired. The same grievance that TANC packaged below as a complaint under California law is currently pending before FERC. If FERC finds that TANC's rights have been impaired, FERC may order rate adjustments or otherwise compel compliance with TANC's rights. If FERC finds that TANC's transmission rights have not been impaired, that should be the end of the story. Consistent with well-established principles of jurisprudence and preemption, TANC may not circumvent, through proceedings under state law, the federal process and federal determinations thereunder.

STATEMENT OF THE CASE

1. Facts

This case stems from the construction of a new electrical interconnection, the "Alturas Intertie," on the interstate transmission system in the western United States. The Alturas Intertie enables Nevada customers to reach the major electrical pathway through Oregon and Washington (the Northwest AC Intertie) and thereby to purchase electricity generated in the Pacific Northwest.

California customers also use the Northwest AC Intertie to purchase electricity from the Pacific Northwest; in that case, electricity is delivered over the Northwest AC Intertie and then over facilities in California known as the California-Oregon Intertie. Before construction of the Alturas Intertie, the California-Oregon Intertie represented the sole export market for electricity delivered over the Northwest AC Intertie.

The Northwest AC Intertie does not have sufficient capacity to meet all demand for service by Nevada and California customers – if that demand arises at the same time. The demand that actually arises at any particular time is a function of customers' purchasing decisions in a highly complex market.

Nevertheless, because potential competition for use of the Northwest AC Intertie now exists, a customer (whether located in Nevada or California) that wishes to rely on the availability of service over the Northwest AC Intertie must pay to reserve service. Before addition of the Alturas Intertie, as the sole export market, TANC and its fellow owners of the California-Oregon Intertie could rely on the availability of service over the Northwest AC Intertie without paying reservation charges.

2. *TANC's grievance*

TANC asserts a priority right for owners of the California-Oregon Intertie to use the existing capacity of the Northwest AC Intertie, such that the Californians would have first call on that capacity without reserving service. TANC describes Nevada customers' use of that capacity as a reduction in capacity available to the Californians and contends that this reduction impairs rights cognizable under California law, including property rights in the California-Oregon Intertie and rights under an agreement for the interconnection of TANC's facilities with the Northwest AC Intertie. Pet. 2-9.

3. *The federal scheme*

Under the Federal Power Act, FERC oversees the development of the interstate transmission grid and the provision of transmission services in interstate commerce through FERC's authority to compel new interconnections, 16 U.S.C. § 824i (2000), to compel mandatory transmission access, 16 U.S.C. §§ 824j and 824k, and to oversee the rates and terms of transmission service agreements and interconnection agreements, 16 U.S.C. § 824d (2000).

A central element of FERC's administration of the Federal Power Act is FERC's Order No. 888, which establishes requirements for non-discriminatory or "open" access to transmission facilities in interstate commerce. 61 Fed. Reg. 21,540 (1996). Order No. 888 is designed to curb the exercise of market power and to promote economically efficient electricity markets. *Id.* at 21,541.

FERC's authority under the Federal Power Act is supplemented by the statutory authority of the Bonneville Power Administration ("Bonneville"). Bonneville oversees expansion and use of the Northwest AC Intertie as part of Bonneville's mandate to market electricity from federally-funded generation facilities in the Pacific Northwest.

16 U.S.C. §§ 837b, 838b, 839b, 839c (2000). Bonneville has voluntarily filed a transmission service tariff with FERC, thereby subjecting use of the Northwest AC Intertie to regulation by FERC.

FERC regulates use of the Northwest AC Intertie through tariffs that comply with Order No. 888. Those tariffs establish all rules and procedures for obtaining service over the Northwest AC Intertie and all applicable rates. 61 Fed. Reg. at 21,541. Any use of the Northwest AC Intertie by Nevada customers rather than California customers (*i.e.*, the "reduction in capacity" about which TANC complains) necessarily occurs in accordance with those federal tariffs. The same is true of any increased cost for reserved service.

4. The ongoing FERC proceeding

TANC notes that its *state law* causes of action have not been addressed by any court or agency. Pet. 4. TANC has, however, submitted the same underlying grievance to FERC. Four years ago, TANC asked FERC to impose conditions on use of the Alturas Intertie to protect TANC's alleged rights. *See Sierra Pacific Power Co.*, 86 F.E.R.C. ¶ 61,198 at 61,689 (1999). FERC declined to impose the requested conditions subject to the outcome of a full evidentiary hearing. *Id.* at 61,699. The case is currently pending decision by FERC. *See* FERC Docket No. ER99-28.

TANC's claims before FERC include TANC's breach of contract claim against FERC's sister agency, Bonneville. Although that claim is not properly before FERC, TANC had full opportunity to pursue that claim within the federal scheme as a whole. Pet. App. A 12a.[1]

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[1] The foregoing statement of the case informs the jurisdictional determinations below. Sierra Pacific preserves its objection to numerous factual and legal errors in TANC's petition that go to the merits of TANC's claims and that fall outside the scope of this proceeding.

REASONS FOR DENYING THE PETITION

In the proceedings below, the Ninth Circuit affirmed dismissal of TANC's complaint against Sierra Pacific on grounds of federal preemption, a principle rooted in the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. The basis for preemption is clear: TANC asserts, against federally-regulated utilities, rights on a federally-regulated transmission system that serves several states and that operates in interstate commerce. The Ninth Circuit's unassailable conclusion that TANC's claim of right is federal in nature and must be resolved solely within the federal scheme raises no novel or important issue that might warrant the Court's attention.

The doctrine of collateral estoppel underscores the lack of need for the Court's review. TANC's grievance is currently pending before FERC and is within FERC's special expertise. This resolution of TANC's grievance within the federal scheme will provide an independent basis for dismissal of TANC's state law claims.[2]

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[2] A similar analysis applies to TANC's breach of contract claim against Bonneville, which is the subject of TANC's Questions Presented Nos. 1 and 2. That claim is directed at a federal agency, is based on a FERC-filed contract that makes no mention of California law, and seeks to establish rights over a federally-regulated electrical transmission system. In addition, the central allegation underlying that claim – that the Alturas Intertie causes a reduction in capacity – is being resolved by FERC. *Sierra Pacific Power Co.*, 94 F.E.R.C. ¶ 63,019 at 65,071 (2001) (the Alturas Intertie causes no reduction in capacity), *exceptions pending*, FERC Docket No. ER99-28. In this light, TANC's state law breach of contract claim is revealed as an illegitimate attempt to circumvent the federal process. Moreover, the independent bases for dismissal of that claim (*i.e.*, federal preemption and collateral estoppel) confirm that TANC's Questions Presented Nos. 1 and 2 do not warrant review.

A. TANC's Claim Of Right To Electrical Transmission Capacity Is A Federal Concern.

The Ninth Circuit properly held that federal oversight of transmission in interstate commerce preempts the adjudication of TANC's alleged transmission rights under California law. The Ninth Circuit's analysis starts with the Federal Power Act, in which Congress asserted exclusive federal jurisdiction over the transmission of electric energy in interstate commerce and established a scheme for federal regulation thereof. *See* Pet. App. A 14a-15a (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)); 16 U.S.C. § 824(a) ("Federal regulation of . . . the transmission of electric energy in interstate commerce . . . is necessary in the public interest"); 16 U.S.C. §§ 824d, 824i, 842j and 824k.

The Court has repeatedly recognized the broad scope and preemptive effect of federal jurisdiction under the Federal Power Act. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). Most recently, in *New York v. FERC*, the Court held that federal jurisdiction over transmission in interstate commerce extends to transmission in open or "unbundled" retail markets, even though the states have historically regulated all retail electric power services. 122 S. Ct. at 1023, 1026.[3]

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[3] TANC's grievance pertains to transmission capacity that is used for interregional transfers of electricity and therefore does not implicate either (1) the proviso in the Federal Power Act that bars federal regulation of local activities that only incidentally affect interstate commerce, *see* 16 U.S.C. § 824(a) ("Federal regulation . . . to extend only to those matters which are not subject to regulation by the States"), or (2) the related question left open in *New York v. FERC* concerning federal jurisdiction over transmission in local retail markets. *See* 122 S. Ct. at 1027-28; Pet. App. A 21a n.9.

As recognized by the Ninth Circuit, rights to use transmission facilities operating in interstate commerce lie at the heart of the federal scheme, as evidenced by FERC's open access rules in Order No. 888. *See* Pet. App. A 20a. Those rules, which impose standards and procedures for the non-discriminatory allocation of transmission capacity, are FERC's primary means of promoting economic efficiency in electricity markets. *Id.* As held by the Ninth Circuit, FERC's open access rules are so fundamental to the operation of electricity markets overseen by FERC that transmission rights must be considered a matter of federal law *even aside* from FERC's statutory authority over transmission in interstate commerce. *Id.* at 20a, 21a n.9. Under the Supremacy Clause, because transmission rights are a central, federal concern, there is no room for state law in adjudicating those rights. *Id.* at 17a, 20a.

The use of state law to establish rights over the interstate transmission grid would also impermissibly conflict with the operation of federal law. Here, any allocation of capacity on the Northwest AC Intertie to Nevada customers rather than California customers – *i.e.*, the "reduction in capacity" about which TANC complains – necessarily arises in accordance with federally-approved tariffs that govern use of the Northwest AC Intertie. A determination under California law that TANC is entitled to a different allocation of capacity would conflict with rights determined under the federal tariffs and is therefore barred under the Supremacy Clause. Pet. App. A 20a-22a. *See also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 310 (1988).

As an independent basis for dismissal of TANC's complaint, the use of California law to adjudicate TANC's alleged transmission rights would produce the constitutionally impermissible effects that led to enactment of the Federal Power Act. Parochial interests could distort (through monetary penalties) the allocation of transmission capacity in the Pacific Northwest and could thus burden the

operation of regional electricity markets. Consistent with longstanding precedent, the interstate flow of electricity may not be subjected to state law but, instead, must be left to exclusive federal control. *See Attleboro*, 273 U.S. at 89-90; *New England Power Co.*, 455 U.S. at 339.

B. TANC's Prayer For Monetary Damages Does Not Convert TANC's Claim Into A Matter For State Law.

TANC's petition rests on a clearly erroneous theory: that California law may be used to affect transmission rights indirectly, through the imposition of monetary damages, as long as California law is not used directly to reallocate capacity. Pet. 4. TANC's emphasis on the form of relief misses the mark. Any relief awarded under California law would rest on an underlying determination of transmission rights. Pet. App. A 20a-21a. TANC's attempt to effectuate its alleged rights indirectly, through monetary damages, does not convert this federal issue into a matter for state law.

1. The federal scheme protects TANC's interests.

TANC claims a constitutional right to seek monetary damages under California law, reasoning that FERC may not award monetary damages and that the Fifth Amendment guarantees redress. Pet. 20-21. TANC's reliance on the Fifth Amendment is flawed in numerous respects, two of which are most notable here.

First, TANC confuses form of relief with the availability of redress. The Fifth Amendment does not guarantee the availability of a particular form of relief. The nature of a plaintiff's claim and the governing law define the scope of remedies. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Charlie F. v. Bd. of Educ. of Skokie School Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996).

Second, the federal scheme provides ample redress for any impairment of TANC's transmission rights. Even assuming that FERC may not award monetary damages, FERC may adjust rates to reflect a loss of transmission capacity, *American Electric Power Service Corp.*, 49 F.E.R.C. ¶ 61,377 at 62,381 (1989), *reh'g denied*, 50 F.E.R.C. ¶ 61,192 (1990), and may require transmitting utilities to comply with a party's transmission rights, 16 U.S.C. §§ 824e(a), 825f, 825h and 825m (2000). The federal scheme also gave TANC the opportunity to seek monetary damages before the Ninth Circuit with respect to TANC's breach of contract claim against Bonneville. Nothing in this federal scheme contemplates supplemental remedies under state law. *See Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162-63 (1922); *Campbell v. San Diego Gas & Elec. Co.*, 2001 WL 1860381 at *2 (E.D. Wash. Sept. 19, 2001) (FERC's refund authority preempts additional damages under state law).

Indeed, TANC's proposed damages would directly conflict with federal law by contradicting transmission rights established under federal tariffs, by burdening access to interstate transmission facilities, and by interfering with cost responsibility and cost recovery under federal tariffs. Further, the proposed damages would have a substantial chilling effect on future interconnections in the region, contrary to federal policy. These conflicts with federal law underscore why TANC's claim must be adjudicated within the federal scheme. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). *See also id.* at 247 (damages are a potent means of regulation).

2. The precedent in the airline industry shows that only harm from *locally-controlled* activities is compensable under state law.

As support for its alleged right to seek damages under California law, TANC mischaracterizes the precedent in the airline industry. According to TANC, state law is regularly used to compensate property owners for harm caused by the federally-approved operation of aircraft. Pet. 12, 20-21.

As the case precedent demonstrates, state law may be used to award compensation *in relation to activities that are left to local control.* For example, in the case on which TANC relied below, homeowners complained that the siting and management of an airport caused excessive noise at the homeowners' property and thereby reduced the value of that property. *See Greater Westchester Homeowners' Ass'n v. Los Angeles*, 26 Cal. 3d 86, 91-92 (1979). The Supreme Court of California held that the homeowners could sue the owner of the airport under state law notwithstanding federal regulation of airline noise levels. *Id.* at 98-99. The court reasoned that the federal scheme does not regulate the siting and management of airports or define the responsibilities of airport owners to their neighbors. *Id.* at 100. In short, the harm that could be compensated under state law resulted from locally-controlled activities, not from federally-approved activities as stated by TANC.

TANC's claims bear no relationship to the claims of homeowners that have been harmed by the siting of an airport. Pet. App. A 16a. TANC's claim of right to transmission capacity is directed, not at local activities, but at the operation of a federally regulated transmission system and, indeed, goes to the heart of the federal scheme. In harmony with TANC's "thousands" of airline cases, *see* Pet. 12, this federal matter must be addressed solely under federal law.

C. TANC's Argument Under The Filed Rate Doctrine Fails To Grapple With Principles Of Federal Preemption.

TANC offers no reason to revisit the filed rate doctrine. The filed rate doctrine governs the relationship between courts and regulatory agencies; it requires the courts to respect an agency's decisions on rates within the agency's jurisdiction and on matters affecting those rates. *See Nantahala*, 476 U.S. 953. As applied by the Ninth Circuit, the courts must respect allocations of transmission capacity arising under FERC's rules because those allocations affect wholesale rates overseen by FERC. Pet. App. A 20a-22a (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981)).

Under TANC's misapplication of the filed rate doctrine: (1) TANC holds a FERC-approved allocation of transmission capacity in the form of the rating of the California-Oregon Intertie, and (2) this FERC-approved allocation constitutes a "filed rate" that may be enforced by a court applying state law. Pet. at 12, 21-24.

As a preliminary matter, TANC errs in characterizing the rating of the California-Oregon Intertie as a FERC-approved allocation of capacity. A rating is the engineering measure of the capability of a transmission facility; FERC does not establish or approve these ratings. FERC merely noted the rating of the California-Oregon Intertie when approving the interconnection agreements for the facilities that form the California-Oregon Intertie. *See Pac. Gas & Elec. Co.*, 63 F.E.R.C. ¶ 63,018 at 63,087 (1993). Even if FERC had "approved" the rating of the California-Oregon Intertie, that rating does not confer rights to use the Northwest AC Intertie.

TANC's approach is equally flawed from an analytical perspective. TANC's approach of treating *alleged* transmission rights as a "filed rate" would invite the courts to

adjudicate matters left to a regulatory agency, contrary to the purpose of the filed rate doctrine. *See Nantahala*, 476 U.S. at 963. Moreover, TANC's approach of enforcing alleged transmission rights under state law would contradict principles of federal preemption as discussed above.

D. The Doctrine Of Collateral Estoppel Provides An Independent Basis For Dismissal Of TANC's Complaint.

Even if TANC's complaint under California law were not preempted, FERC's upcoming decision would likely dispose of the matter.

The well-established doctrine of collateral estoppel precludes relitigation of the same matter in multiple fora. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979). Here, TANC naturally did not plead state law causes of action to FERC, but TANC presented every element of its underlying grievance to FERC, including TANC's central allegation that operation of the Alturas Intertie causes a reduction in transmission capacity available to TANC. *Sierra Pacific*, 86 F.E.R.C. at 61,689. The only matter that TANC submitted to FERC and that is not properly before FERC is TANC's legal allegation that Bonneville breached its agreements with TANC. Nevertheless, the factual predicate behind that allegation – that the Alturas Intertie causes a reduction in capacity available to TANC – is properly being resolved by FERC. Under the doctrine of collateral estoppel, TANC may not turn to another jurisdiction seeking relitigation of the same matters. *See United States v. Utah Constr. and Mining Co.*, 384 U.S. 394, 420-422 (1966); *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 797-98 (1986).

The doctrine of collateral estoppel applies with particular force to the decisions of an administrative agency when the agency has jurisdiction over and has fully heard the matter. 384 U.S. at 422. Here, FERC asserted jurisdiction over TANC's grievance and, at TANC's insistence, conducted extensive hearings. Moreover, FERC has the best expertise to resolve the underlying issues, including whether TANC has incurred a reduction in capacity, whether the rating of the California-Oregon Intertie allocates capacity on the Northwest AC Intertie, whether TANC's ownership rights in the California-Oregon Intertie convey a priority right to use the Northwest AC Intertie, and whether TANC's claim of right offends FERC's open access requirements. Because FERC has the appropriate expertise and is actively resolving TANC's grievance, the Court need not attend to TANC's questions presented here.[4]

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[4] Two additional jurisdictional flaws are associated with TANC's claim that Sierra Pacific misrepresented the projected use of the Alturas Intertie to state regulators. *See* Pet. 9, Pet. App. A 23a-25a. First, TANC has raised that claim before every conceivable body – except the state regulators to whom the supposed misrepresentations were made. Second, the alleged misrepresentation was immaterial to the state regulators' limited inquiry: whether potential benefits to ratepayers justified Sierra Pacific's investment in the Alturas Intertie. Because transmission access is a matter of federal law, state regulators *could not* have conditioned their investment approval on an understanding that Sierra Pacific would limit use of the Alturas Intertie. These jurisdictional flaws provide additional bases for summary dismissal of TANC's claim and, again, underscore the lack of need for the Court's review of the questions presented.

CONCLUSION

For the foregoing reasons, TANC's petition for writ of certiorari should be denied.

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December 23, 2002

No. 02-529

In the Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,
PETITIONER

v.

SIERRA PACIFIC POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The brief for the federal respondent addresses the following questions presented by the petition:

1. Whether petitioner's claim that the Bonneville Power Administration breached its alleged contractual obligation to provide specified power transmission capacity by participating in the construction and operation of the Alturas Intertie Project is effectively a challenge to the administrative decision to build and operate that project, and thus within the exclusive original jurisdiction of the Ninth Circuit under 16 U.S.C. 839f(e)(5).

2. Whether petitioner's lawsuit was subject to the requirement of 16 U.S.C. 839f(e)(5) that "[s]uits to challenge * * * final actions and decisions" taken by the Bonneville Power Administration under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, be filed within ninety days of when the action or decision is deemed final.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-27a) is reported at 295 F.3d 918. The opinion of the district court (Pet. App. 28a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2002. An amended decision was issued on July 8, 2002, and a petition for rehearing was denied the same day (Pet. App. 27a). The petition for a writ of certiorari was filed on October 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the Transmission Agency of Northern California, an agency formed by several California municipalities, brought suit in state court against the Bonneville Power Administration (BPA) and several regional utility companies asserting claims for money damages and equitable relief stemming from the construction and operation of an electricity intertie known as the Alturas Intertie. Respondents removed the suit to the United States District Court for the Eastern District of California, which dismissed the claims against BPA for lack of subject matter jurisdiction, concluding that those claims challenged final agency action by BPA and therefore fell within the exclusive original jurisdiction of the Ninth Circuit. See 16 U.S.C. 839f(e)(5). It also held that state-law tort and breach of contract claims against the regional utility companies were preempted under the Federal Power Act, 16 U.S.C. 791a *et seq.* The court of appeals affirmed.

1. The Bonneville Power Administration is a federal agency established within the United States Department of Energy by the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* BPA is responsible for marketing and transmitting electricity generated by the federal Columbia River power system in several States primarily in the Pacific Northwest.[1] BPA has extensive

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[1] The "Pacific Northwest" consists of: "(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin, and; (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on

statutory obligations with respect to the power needs of its customers. Because those obligations cannot be met solely from the regional hydroelectric resources under its control, the agency is authorized to acquire generation capacity on behalf of its customers. See *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984). BPA also owns, operates and maintains approximately 15,000 miles of high-voltage transmission lines comprising the federal Columbia River Transmission System, which provides approximately 80% of the bulk transmission capacity in the Pacific Northwest. See *Association of Pub. Agency Customers, Inc.* v. *Bonneville Power Admin.*, 126 F.3d 1158, 1163 (9th Cir. 1997).

BPA's operating decisions frequently have significant consequences for energy markets, and those decisions are often challenged in litigation. In recognition of that fact, Congress included provisions designed to streamline BPA litigation in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.* (Northwest Power Planning Act or Act), in an effort to "expedite litigation challenging BPA actions under the Act." *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 815 (9th Cir. 1986). To promote uniform interpretation of its provisions, the Act provides for exclusive jurisdiction over challenges to final agency action and the implementation of such actions in the United States Court of Appeals for the Ninth Circuit, and requires expedited filing to ensure prompt resolution of litigation. *Ibid.*; *Puget Sound Energy, Inc.* v. *United States*, 47 Fed. Cl. 506, 511 (2000). The Act provides in relevant part:

December 5, 1980, which has a distribution system from which it serves both within and without such region." 16 U.S.C. 839a(14).

> Suits to challenge * * * final actions and decisions taken pursuant to this chapter by the Administrator [of BPA] or the [Northwest Power Planning] Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. § 832 et seq.], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. * * * Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. 839f(e)(5). See generally *Pacific Power & Light Co.*, 795 F.2d at 814.

2. a. Petitioner is an agency formed by several municipalities in Northern and Central California to provide electric transmission facilities and services for its members. Petitioner is the majority owner of a 1600 megawatt (MW) transmission line between California and Oregon known as the California-Oregon Transmission Project. Respondents BPA, Portland General Electric, and PacifiCorp operate an electric transmission interconnection known as the Northwest AC Intertie.[2] The California-Oregon Transmission Project was joined with the Pacific AC Intertie to form the California-Oregon Intertie, which has a transfer capacity of 4800 MW. Pet. App. 3a-4a. Petitioner and respondents

[2] An "intertie" is an interconnection of two or more electric utility systems that permits the passage of current.

BPA, Portland General Electric, and PacifiCorp agreed to connect the Northwest AC Intertie with the California-Oregon Intertie at the California-Oregon border. Pet. App. 4a.

b. On February 15, 1996, BPA announced its decision to join the Northwest AC Intertie with the new 300 MW Alturas Intertie, which was to be constructed by respondent Sierra Pacific Power Company. See *Decision to Interconnect With Sierra Pacific Power Company's Alturas Transmission Line Project*, 61 Fed. Reg. 7095 (1996); Pet. App. 4a. The proposed Alturas Intertie would connect the Northwest AC Intertie with Sierra Pacific facilities in Nevada. No party sought review of that decision. Gov't C.A. Br. 6-7. On October 2, 1998, Sierra Pacific submitted the Alturas Intertie Project Interconnection and Operation and Maintenance Agreement—an agreement among Sierra Pacific, BPA, and PacifiCorp—to the Federal Energy Regulatory Commission (FERC) for approval. See *Department of Energy Notices*, 63 Fed. Reg. 56,018, 56,019 (1998).

c. Before the Alturas Intertie began operating, petitioner filed an unsuccessful objection with FERC alleging that the Alturas Intertie would create a megawatt-for-megawatt reduction in the capacity of the California-Oregon Intertie. Thus, petitioner contended, if the Alturas Intertie were operating at its maximum 300 MW capacity, the California-Oregon Intertie would experience a reduction of 300 MW capacity. In that proceeding before FERC, petitioner claimed that it had a right of first priority of access to 4800 MW of transfer capacity on the California-Oregon Intertie pursuant to agreement with respondents BPA, Portland General Electric, and PacifiCorp (Pet. App. 3a, 5a), and requested that FERC protect its claimed contractual

entitlement. Alternatively, petitioner asked FERC to delay operation of the Alturas Intertie until either Congress approved the intertie, or the Northwest AC Intertie's capacity was increased to 5100 MW so the Alturas Intertie could be operated without reducing the capacity of the California-Oregon Intertie below 4800 MW. FERC denied those requests and, on November 30, 1998, it approved operation of the Alturas Intertie. Pet. App. 5a; *Sierra Pac. Power Co.*, 85 F.E.R.C. ¶ 61,314 (1998). In December 1998, the Alturas Intertie began operating. Pet. App. 30a.

3. a. In February 1999, FERC initiated hearings on the connection agreement creating Alturas Intertie. *Sierra Pac. Power Co.*, 86 F.E.R.C. ¶ 61,198 (1999). But before the FERC proceeding was resolved,[3] in December 1999, petitioner filed suit in California Superior Court against respondents BPA, Sierra Pacific, Portland General Electric, and PacifiCorp. Petitioner alleged that respondents BPA, PacifiCorp, and Portland General Electric had entered into agreements with it to "provide the facilities necessary to transfer 4800 MW at the California-Oregon border," and had "breached these agreements * * * by allowing,

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[3] After the district court filed its opinion in this case, an administrative law judge rendered a decision in the FERC proceeding. See *Sierra Pac. Power Co.*, 94 F.E.R.C. ¶ 63,019 (2001). The judge rejected petitioner's claims in relevant part and approved the interconnection agreement and the operating agreement. Among other things, the administrative law judge commented that the "meager evidence [presented by petitioner] is insufficient to demonstrate that the California Utilities's transmission systems will be impaired." *Id.* at 65,144. Petitioner's exceptions to the administrative law judge's decision are currently pending before FERC. Sierra Power Co., FERC Docket Nos. ER99-28-000, ER99-945-000 & ER99-28-000.

agreeing to and participating in the construction and operation of the Alturas Intertie Project." C.A. E.R. 7 (Compl. ¶¶ 33, 35). Petitioner asserted that the operation of the Alturas Intertie reduces the amount of power delivered via the California-Oregon Transmission Project, thus impairing its interests. C.A. E.R. 7-8 (Compl. ¶ 35). Petitioner claimed that, *inter alia*, BPA's and the other respondents' participation in the creation and operation of the Alturas Intertie constituted an inverse condemnation, trespass, private nuisance, conversion, breach of contract, interference with contractual relations, and interference with prospective economic advantage. C.A. E.R. 4-9. Petitioner also asserted that respondent Sierra Pacific had engaged in fraud by making misrepresentations before unspecified governmental agencies to obtain approval for the Alturas Intertie. *Id.* at 5-6; Pet. App. 6a.

b. Respondents removed the action to federal district court. The district court dismissed the claims against BPA for want of subject matter jurisdiction. The district court held that petitioner's claims against BPA were, essentially, challenges to the agency's administrative decision to participate in the Alturas Intertie. Pet. App. 39a-42a. Such claims, the district court held, could be brought only by seeking review directly in the United States Court of Appeals for the Ninth Circuit pursuant to 16 U.S.C. 839f(e)(5). Pet. App. 42a. The district court rejected petitioner's request for a transfer of the proceedings pursuant to 28 U.S.C. 1631, concluding that "[t]he interests of justice are better served here by dismissal." *Ibid.*

The district court also dismissed petitioner's claims against respondents Sierra Pacific, PacifiCorp, and Portland General Electric. Noting that petitioner was pursuing "the same basic issues" (Pet. App. 49a) in pro-

ceedings brought before FERC, see note 3, *supra*, the district court held that petitioner's claims were preempted by the Federal Power Act, 16 U.S.C. 824(b)(1). Pet. App. 49a.

4. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court first held that it had exclusive original jurisdiction over petitioner's claims against BPA under 16 U.S.C. 839f(e)(5) and that the district court therefore had "correctly dismissed [those] claims against the BPA for lack of subject matter jurisdiction." Pet. App. 13a. The court noted that it had "consistently interpreted" Section 839f(e)(5)'s "judicial review provision 'with a broad view of this Court's jurisdiction and a narrow definition of district court jurisdiction.'" *Id.* at 9a (quoting *Central Mont. Elec. Power Coop., Inc.* v. *Administrator*, 840 F.2d 1472, 1475 (9th Cir. 1988)). The court explained that under its precedents, the focus of the jurisdictional inquiry is not on the "theory of recovery" advanced by the plaintiff, but on "whether the factual basis for the [claim] is an agency action authorized by the Act." *Ibid.* (quoting *Central Mont. Elec. Power*, 840 F.2d at 1476). The court distinguished its earlier decision in *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (9th Cir. 1988), in which the court held that it lacked original jurisdiction over a claim for breach of an oral contract, on the grounds that the case had involved "allegations of facts outside an administrative record" and "the principal conduct of the agency on which [the] claim is based *is not final action taken pursuant to statutory authority.*" Pet. App. 11a (quoting *Public Util. Dist. No. 1*, 855 F.2d at 649-650). The court noted that here, by contrast, petitioner's "claims cannot be separated out from the BPA's final administrative decision" to connect the Alturas Intertie and the Northwest AC Intertie. *Id.* at 11a-12a.

b. The court also concluded that the district court acted properly in declining to transfer the case to the court of appeals for resolution because transfer "would have been untimely" even if it had been filed there originally. Pet. App. 13a. The court noted that Section 839f(e)(5) "requires that suits challenging a final BPA action, or its implementation, be filed within ninety days of the BPA giving notice of the action in the Federal Register or of the action becoming final." *Ibid.* Because BPA announced its decision to interconnect the Northwest AC Intertie to the Alturas Intertie in February 1996, petitioner's lawsuit, filed in December 1999, was untimely. *Ibid.* The court also rejected petitioner's alternative request to transfer the matter to the Court of Federal Claims, see 28 U.S.C. 1346(a)(2), 1491, noting that jurisdiction exists in that court only where the Ninth Circuit lacks exclusive jurisdiction under 16 U.S.C. 839f(e)(5). Pet. App. 13a n.6.

c. The court of appeals also affirmed the district court's dismissal of the petitioner's claims against Sierra Pacific, PacifiCorp, and Portland General Electric, concluding they were preempted by federal law. The court held that because FERC approved the construction and operation of the Alturas Intertie, "FERC alone has the authority to modify its decision pertaining to the Alturas Intertie, or to respond to challenges to the Intertie's operation. [Petitioner] cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." Pet. App. 15a. Thus, the court held, petitioner's state-law tort and property claims against the regional utility respondents are preempted. *Id.* at 15a-16a.

The court of appeals then held that petitioner's contract-related claims "run[] afoul of the filed rate doctrine" (Pet. App. 17a), which provides that state law "may not be used to invalidate a filed rate" approved by an administrative agency. *Ibid.* See generally *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (holding that plaintiff could "claim no rate as a legal right that is other than the filed rate" set or accepted by the forerunner to FERC). The court held that petitioner's contract claims against the regional utilities in this case are tantamount to "claims of entitlement to a specific allocation of interstate transmission capacity." Pet. App. 20a-21a. Noting that FERC had chosen to regulate transmission rates through a market system by setting rules requiring open access to transmission lines at uniform, openly disclosed rates—and thus "functionally combined FERC regulation of rates with FERC regulation of transmission capacity" (*id.* at 20a)—the court reasoned that any claim "to a particular allocation of interstate transmission capacity * * * would restrict FERC's ability to regulate rates through its open transmission policy." *Ibid.* Accordingly, the court held, petitioner's claims are precluded by the filed rate doctrine.

d. The court also rejected petitioner's fraud claim against respondent Sierra Pacific.[4] Because the award of any damages would necessarily assume that petitioner had a "'right' to 4800 MW" (Pet. App. 24a), and thereby "undermine FERC's ability to regulate rates through its open access transmission policy" (*id.* at 25a),

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[4] Although petitioner had not indicated before which regulatory body Sierra Pacific allegedly had engaged in fraud, the court construed the claim to allege fraud before the California Public Utilities Commission. Pet. App. 23a.

the court concluded that the fraud claim is preempted by the filed rate doctrine. The court cautioned, however, that its holding would not apply to "every case where FERC and a state utility commission have both approved a defendant's electricity intertie." *Ibid.* Rather, dismissal was required in this case only because petitioner "has failed to present a model of damages that does not impermissibly rely upon an assumption that FERC would have continued to allocate a certain amount of electricity transmission capacity to the California Oregon Intertie but for Sierra Pacific's misrepresentations." *Id.* at 26a.

ARGUMENT

The decision of the court of appeals affirming the dismissal of claims against BPA is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends that the court of appeals erred in holding that it had exclusive original jurisdiction under 16 U.S.C. 839f(e)(5) over petitioner's claim against BPA, which petitioner characterizes as a "pure and unadulterated * * * breach of contract claim." Pet. 14. Petitioner argues that the decision in this case conflicts with the court of appeals' prior decision in *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (9th Cir. 1988). Even if petitioner were correct that the decision below is inconsistent with *Public Utility District No. 1*, claims of an intra-circuit conflict do not ordinarily warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision below is consistent with *Public Utility District No. 1* and with the Ninth Circuit's longstanding construction of its

grant of exclusive original jurisdiction under 16 U.S.C. 839f(e)(5), and petitioner cites no decisions of any other court that cast doubt on the Ninth Circuit's ruling.

Section 839f(e)(5) grants "the United States court of appeals for the region" of the Pacific Northwest (*i.e.*, the United States Court of Appeals for the Ninth Circuit) exclusive original jurisdiction over "[s]uits to challenge * * * final actions and decisions taken pursuant to [the Northwest Power Planning Act] by the Administrator [of BPA] or the [Northwest Power Planning] Council, or the implementation of such final actions." To effectuate Congress's purposes of "expedit[ing] litigation challenging BPA actions under the Act" and promoting uniform application of the Act, *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 815 (1986), the Ninth Circuit "has consistently interpreted the Act with a broad view of this court's jurisdiction and a narrow definition of district court jurisdiction." *Id.* at 814; accord *Central Mont. Elec. Power Coop., Inc.* v. *Administrator*, 840 F.2d 1472, 1475 (9th Cir. 1988). In determining whether a claim is subject to its exclusive original jurisdiction, the court of appeals consistently has looked past the labels used by the litigants and instead "focuse[d] on the agency being attacked and whether the factual basis for that attack is an agency action authorized by the Act." *Pacific Power & Light*, 795 F.2d at 816. "For jurisdictional purposes, therefore, it matters not whether the * * * suit is grounded in contract, administrative law or some other legal theory. Instead, jurisdiction [in the court of appeals] arises because the actions of a particular agency are being challenged and because of the nature of the agency action at issue." *Ibid.*; accord *Public Util. Dist. No. 1*, 855 F.2d at 649; *Central Mont.*, 840 F.2d at 1476.

Petitioner's claim against BPA falls squarely within the Ninth Circuit's exclusive original jurisdiction. Although petitioner now contends that its claim did not challenge BPA's "participation in the Alturas Intertie Project" (Pet. 15) and that "no federal agency took any actions" that caused the reduction in capacity to the California-Oregon Intertie (Pet. 14), the statement of the claim in petitioner's complaint is precisely to the contrary. In the complaint, petitioner alleged that BPA "breached th[e] agreements * * * by allowing, agreeing to and participating in the construction and operation of the Alturas Intertie Project." C.A. E.R. 7 (Compl. ¶ 35). As the court of appeals correctly concluded, petitioner's "breach of contract claims cannot be separated out from the BPA's final administrative decision. In deciding to join the Northwest AC Intertie with the Alturas Intertie without also making provision to increase the capacity of the Northwest AC Intertie, the BPA plainly decided to take an action" that would affect the California-Oregon Intertie's transmission capacity and that was "inconsistent with the BPA's alleged contractual commitments to [petitioner]." Pet. App. 11a-12a. Accordingly, the Ninth Circuit properly concluded it had exclusive original jurisdiction over the claim. Cf. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [vesting the court of appeals with exclusive jurisdiction to review agency orders] by requesting the District Court to enjoin action that is the outcome of the agency's order."). The court of appeals' application of the exclusive jurisdiction provision of Section 839f(e)(5) to the particular facts of this case does not warrant further review.

Although petitioner characterizes its claim as involving only breach of contract, it is well established

that "[a] party's characterization of its claim as one for breach of contract is not dispositive of jurisdictional issues" under Section 839f(e)(5). *CP Nat'l Corp.* v. *Jura*, 876 F.2d 745, 747 (9th Cir. 1989). The Ninth Circuit repeatedly has asserted exclusive original jurisdiction in cases involving alleged breaches of contract. See, *e.g.*, *M-S-R Pub. Power Agency* v. *Bonneville Power Admin.*, 297 F.3d 833, 840 (9th Cir. 2002) (asserting exclusive original jurisdiction over claim that BPA "failed to abide by the requirements of [a] [s]ales [a]greement when forecasting excess federal power" because it "actually challenges a decision made pursuant to BPA's statutory authority"); *Kaiser Aluminum & Chem. Corp.* v. *Bonneville Power Admin.*, 261 F.3d 843, 852 (9th Cir. 2001) (asserting original jurisdiction over claim that BPA breached contractual obligation to provide surplus power at particular rate); *CP Nat'l Corp.*, 876 F.2d at 747-748 (asserting original jurisdiction over claim that BPA breached power sales contract by imposing additional fee); *Pacific Power & Light*, 795 F.2d at 815-816 (asserting exclusive original jurisdiction over action "seek[ing] a declaratory judgment to prevent a breach of contract" because "the effect of th[e] action would be to challenge BPA's ratemaking proceedings")[5]; accord *Puget Sound Energy, Inc.* v. *United States*, 47 Fed. Cl. 506, 511 (2000) ("Despite petitioner's

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[5] Although petitioner attempts to distinguish *Pacific Power & Light* on the ground that "the Agreements [at issue in this case] do not restrict in any way whatsoever the manner in which BPA conducts activities which it is required or authorized by law to undertake" (Pet. 15), petitioner's claim is that BPA breached the agreements "by allowing, agreeing to, and participating in * * * the operation of the Alturas Intertie." C.A. E.R. 7. If accepted, that claim would plainly affect the ability of BPA to operate the Alturas Intertie and its ability to sell and market power in Nevada.

characterization of its claim as one for breach of contract, it is actually a claim challenging [BPA's action] and its implementation," and thus "jurisdiction over this dispute lies in the Circuit Court").

Those holdings appropriately reflect the central importance of contracts to the performance of BPA's regulatory mission. BPA frequently enters into contracts to perform its regulatory function as a power marketing agency, through, for example, the sale of federal power to industrial customers, the exchange of power with residential customers, the acquisition of resources, and the operation of transmission facilities. See generally *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 386-388 (1984) (discussing BPA's use of contracts in performing its regulatory mission). Because many of BPA's regulatory decisions are implemented through contracts, permitting a litigant to circumvent the Ninth Circuit's exclusive original jurisdiction by characterizing its claim as one for breach of contract would severely undermine Section 839f(e)(5)'s purposes of expediting litigation before a single court and promoting consistency in decisions. Cf. *Central Mont.*, 840 F.2d at 1476 ("[p]ermitting district court jurisdiction where a party challenging a BPA decision partially grounds its theory of recovery outside of the Northwest Power Planning Act would frustrate Congress's intent").

Public Utility District No. 1, on which petitioner relies (Pet. 15), is not to the contrary. In that case, the petitioner alleged in relevant part that a BPA representative had made an oral agreement to purchase power from the utility district. The court held that that claim was properly within the jurisdiction of the United States Claims Court (now the United States Court of Federal Claims), emphasizing that "the principal con-

duct of the agency on which petitioner's claim is based is not final action taken pursuant to statutory authority; it is alleged contractual commitments made outside the scope of any administrative record." 855 F.2d at 650. Here, by contrast, "[t]he root cause of the alleged * * * breach of contract" was BPA's final action in joining the Northwest AC Intertie with the Alturas Intertie. Pet. App. 12a.

2. Petitioner next contends that the Ninth Circuit erred in holding that its claims were untimely because they were not filed, as Section 839f(e)(5) requires, "within ninety days of the time such action or decision [of the agency] is deemed final." Pet. 17-19. Petitioner claims the court of appeals' interpretation is inconsistent with Section 839f(e)(5), and would require the needless filing of "'protective' or 'preemptive' lawsuit[s] potentially years before a breach occurs." Pet. 18. That contention is simply a variation of petitioner's argument, discussed above, that the Ninth Circuit does not have exclusive jurisdiction over breach of contract claims. Assuming that a suit is properly classified as one that seeks to "challenge * * * final actions and decisions taken pursuant to [the Northwest Power Planning Act] by [BPA], or the implementation of such final actions" (16 U.S.C. 839f(e)(5)), the Act unequivocally requires that "[s]uch suits *shall* be filed within ninety days of the time such action or decision is deemed final." *Ibid.* (emphasis added).

Petitioner errs in suggesting that the decision in this case will require parties to file protective lawsuits whenever the "BPA makes an administrative decision to take an action which does not constitute a breach of contract * * * but *might* under certain circumstances cause a breach to occur years later." Pet. 18. The court of appeals' decision carries no such implication. Peti-

tioner has made no showing that it was not on notice of the potential interference in February 1996, when BPA announced its final decision to construct transmission facilities and participate in the interconnection of Northwest AC Intertie to the Alturas Intertie. See Pet. App. 13a; see also 61 Fed. Reg. 7095 (1996). (Indeed, petitioner's claims before FERC reflected its awareness, even before the Alturas Intertie began operating, that operation of the Alturas Intertie would impair transmission capacity on the California-Oregon Intertie. See Pet. App. 3a, 5a.) Petitioner therefore could have made a timely claim in 1996 that BPA's participation in the Alturas Intertie violated the Administrator's duties by furnishing transmission services that would substantially interfere with BPA's "power marketing program, applicable operating limitations or existing contractual obligations." 16 U.S.C. 839f(i)(3). Even if the relevant final agency action were the date on which the Alturas Intertie began operating in December 1998[6]—at which point petitioner concedes that "[t]he breach * * * first occurred" (Pet. 17)—petitioner's claim would still be untimely, because its

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[6] In the court of appeals, petitioner did not raise the question of which specific BPA action constituted "final action." See Pet. C.A. Br. 29-30; Pet. C.A. Reply Br. 38-42. The court of appeals apparently concluded that the final action was BPA's announcement in February 1996 of its decision to interconnect the Northwest AC Intertie to the Alturas Intertie. Pet. App. 13a. However, the court did not purport to hold that in all cases asserting breach of contract arising from agency action, the relevant date would be the date the agency announced its decision to undertake a course of action, rather than the date of implementation. Section 839f(e)(5) provides for jurisdiction in the Ninth Circuit over suits challenging the "implementation" of final actions and decisions of BPA, as well as the initial renderings of final actions and decisions.

complaint was not filed until a year later. Pet. App. 13a.

Thus, as the court of appeals correctly concluded, petitioner cannot raise its claims "at this late date by clothing its challenge in state law claims." Pet. App. 12a. See generally *Association of Pub. Agency Customers, Inc.* v. *Bonneville Power Admin.*, 126 F.3d 1158, 1182-1183 (9th Cir. 1997) (claim untimely under 16 U.S.C. 839f(e)(5) where filed more than 90 days after challenged business plan record of decision was executed). Further review is not warranted.[7]

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[7] Petitioner's remaining contentions concern the court of appeals' dismissal of its state-law tort, property, and contract claims against the regional utility respondents on federal preemption grounds under the Federal Power Act (*i.e.*, the third and fourth questions presented by the petition). BPA did not separately brief those issues in the court of appeals, although it noted its agreement with the district court on those questions and pointed out the special statutory provisions addressing FERC's jurisdiction over governmental entities such as BPA, as distinguished from private utilities. See BPA C.A. Br. 33-36. This brief therefore does not address the general Federal Power Act preemption issues raised by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002

Supreme Court, U.S.
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No. 02-529

IN THE

Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Petitioner,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. INTRODUCTION

As discussed below, the authorities and arguments presented by respondents further illustrate how the Ninth Circuit's decision is in conflict with: decisions in the other circuits regarding federal preemption and the filed rate doctrine; the clear meaning of 16 U.S.C. § 839f(e)(5); and its own decisions regarding its own jurisdiction over contract claims against BPA.

II. REPLY TO OPPOSITION FILED BY SIERRA PACIFIC POWER COMPANY

A. Aircraft Noise Cases Do Provide A Useful Analogy.

TANC has suggested that inverse condemnation cases and nuisance cases in which property owners are awarded compensation for the adverse effects of noise from aircraft illustrate that "state" causes of action may arise out of activities which are federally regulated.

The case of *Greater Westchester Homeowners Association v. Los Angeles*, (1979) 26 Cal.3d 86 cited by Sierra Pacific is a good example. Sierra Pacific argues that under the *Greater Westchester* case "the harm that could be compensated under state law resulted from locally controlled activities, not from federally approved activities as stated by TANC". SP Opposition, page 12. To the contrary, the activity giving rise to the claims in the *Greater Westchester* case was the flying of commercial aircraft – an activity fully controlled by the federal government. Further, the very aspect of that activity causing harm – noise – is specifically governed by federal regulation. The California Supreme Court noted that "the federal government exercises exclusive control over aircraft 'in flight', defined as all movement of the plane from departure to arrival gates" (*Id.* at 92); that "federal noise control standards have been in effect since 1969" (*Id.* at 95); and that this Court in *City of Burbank v. Lockheed Air Terminal*, (1973) 411 U.S. 624, had held that the Federal Aviation Act "had completely preempted local regulation of 'aircraft in flight' for the purpose of aviation noise abatement" (*Id.* at 95). Further, the City of Los Angeles,

as Sierra Pacific does here, argued federal preemption: "pointing to the depth of federal involvement in air navigation and noise abatement . . . City and its amici urge preclusion of any state recognized tort liability for airport noise". *Id.* at 99. The activity at issue in *Greater Westchester* was clearly federally regulated, not locally controlled as Sierra Pacific contends. Indeed, local control of airport noise *would* be preempted: "the noise in question originates from flying aircraft over which the United States government exercises exclusive dominion and therefore any attempted noise control by an airport operator is federally preempted". *Id.* at 93.

While the State of California may not regulate aircraft noise, it may provide for tort and other remedies for those aggrieved by it. Likewise, the State of California may not regulate the activities of the respondents to the extent those activities are regulated by FERC, but may certainly provide for the remedies which TANC seeks in this action.

B. The Ninth Circuit Did Misapply The Filed Rate Doctrine.

Sierra Pacific argues that TANC misapplies the filed rate doctrine. It is the Ninth Circuit which applied the filed rate doctrine, not TANC. TANC does not believe that the filed rate doctrine applies at all in this case.

Sierra Pacific argues that TANC mistakenly construes the FERC-approved allocation of 4800 MW to be a "filed rate". It was the Ninth Circuit, not TANC, that came up with the idea that FERC allocations or ratings are "filed rates" for purposes of the filed rate doctrine.

Sierra Pacific argues that "even if FERC had 'approved' the rating of the California-Oregon Intertie, that rating does not confer rights to use the Northwest AC Intertie". SP Opposition, page 13. TANC agrees with this statement. TANC's rights stem not from a rating, but from its Agreements with the Northwest Parties. Further, TANC makes no claim that it has a "right to use the Northwest AC Intertie". TANC claims that it has a right to expect the Northwest Parties to abide by their contractual promises to maintain 4800 MW of north to south capacity at the California-Oregon border.

C. The Doctrine of Collateral Estoppel Does Not Prohibit One Who Opposes A Project Before An Administrative Agency From Thereafter Seeking Damages After The Project Becomes Operational.

As far as TANC is aware, courts in most jurisdictions, California included, *require* a complainant to exhaust administrative remedies before resorting to the courts. Of course, TANC's position before FERC that the Alturas line should not be built, and TANC's claims in this litigation that the line, now that it has been built, has resulted in damages to TANC, are supported by the same circumstances – initially predicted, now reality. But that is the case whenever exhaustion of administrative remedies is followed by litigation.

None of the cases cited by Sierra Pacific precludes TANC's claims. None holds that a party which pursues administrative remedies with regard to a matter is thereafter precluded from litigating that same matter.

The question in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) was "whether a party who has had issues of fact adjudicated adversely to it in an equitable *action* may be collaterally estopped from relitigating the same issues before a jury and in subsequent legal action brought against it by a new party". (*Id.* at 324; emphasis added). Here, TANC has never previously litigated its claims in any *action*.

United States v. Utah Construction Co., 384 U.S. 394 (1966) involved the contract provision that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal of the head of the department whose decision shall be final and conclusive upon the parties thereto". *Id.* at 397-398. Here, there is no such contract provision, and no officer or agency has ever decided any of TANC's breach of contract or other claims.

In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), this Court citing *United States v. Utah Construction & Mining Company*, 384 U.S. 394 (1966), held that "when an administrative agency is *acting in a judicial capacity* and

resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose". (*Id.* at 797-798; emphasis added). Here, no administrative agency *acting in a judicial capacity* has ever resolved disputed issues of fact regarding any of TANC's claims in this action.

Sierra Pacific's argument is that a party who opposes a project during hearings of the administrative agency charged with approval of that project is thereafter foreclosed from litigating claims arising out of the project's adverse impacts (which the party warned would occur). As far as TANC is aware, no case has ever so held.

Sierra Pacific argues that the "factual predicate" behind TANC's claims that the Northwest Parties breached the Agreements is that the Alturas Intertie causes a reduction in capacity at the California-Oregon border – a factual issue being "resolved by FERC". First, the factual predicate of TANC's claims is that the Northwest Parties failed to maintain 4800 MW of north to south transfer capacity at the California-Oregon border. Second, FERC, all parties involved in this action, and the District Court in footnote 6 of its opinion, all concur that "when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the California-Oregon Intertie is reduced by the amount delivered to the Alturas Intertie". (Appendix B, page 31a). Reduction in capacity is not an "issue" to be decided by anyone. It is an undisputed fact.

FERC has expertise over matters such as rates, capacity allocation, access, priority, and priority rights. TANC in this litigation does not ask the Court to evaluate, set, or even address any of the aforementioned.

D. TANC Does Not Seek To Adjudicate Transmission Rights.

Sierra Pacific argues that TANC may not in this action "establish rights over the interstate transmission grid". SP Opposition, page 9. TANC does not seek to do so. It does

not seek to establish, challenge, modify or adjudicate rates, tariffs, ratings, access or transmission rights. It seeks money damages because the Northwest Parties breached their promises to maintain 4800 MW of north to south capacity at the California-Oregon border which they made in the Agreements, and it seeks money damages on account of the physical interference with its facilities caused by the operation of the Alturas Intertie Project.

III. REPLY TO OPPOSITION FILED BY BONNEVILLE POWER ADMINISTRATION ("BPA")

A. TANC Does Not Challenge BPA's Decision To Participate In The Alturas Intertie Project.

In order to justify application of 16 U.S.C. § 839f(e)(5), BPA attempts to characterize TANC's claims as a challenge to BPA's participation in the Alturas Intertie Project. BPA supports that characterization by quoting the allegation in paragraph 35 of TANC's complaint that the Northwest Parties breached the Agreements by such participation. BPA does this even though it also argues that it is the true nature of a Plaintiff's claim which is determinative, not the Plaintiff's characterization of that claim in its complaint. More importantly, if one reads this isolated allegation within the context of the other allegations in TANC's sixth cause of action (E.R. 6-8), it is clear that the essence of the breach of the Agreements is the failure to maintain 4800 MW of transfer capability. Indeed, in the sentence after the one cited by BPA, TANC explains that whenever power is transferred north to south to the Alturas Intertie Project, the capability of the Northwest Parties to export power to the California Transmission Facilities is reduced on a MW for MW basis.

Technically, the allegations cited by BPA are superfluous. BPA's interconnection to the Alturas Intertie Project is not a per se breach of the Agreements. Nowhere do the Agreements prohibit such an interconnection. Further, interconnection with the Alturas Intertie Project does not inevitably lead to a breach of the Agreements. Other measures, such as increasing the capacity of the Northwest Intertie, or taking into account the

Northwest Parties' contractual obligations to TANC when scheduling flows from the Northwest Intertie, would allow the Alturas Intertie Project to operate without impacting TANC's rights under the Agreements. Put another way, if the Northwest Parties maintain 4800 MW of transfer capability at the California-Oregon border, they are not in breach of the Agreements. If they do not, they are in breach. Neither conclusion is affected by interconnection to the Alturas Intertie Project.

BPA's decision to join the Northwest Intertie with the Alturas Intertie Project was not per se inconsistent with BPA's obligations under the Agreements. Such an interconnection is not a per se a breach of the Agreements and neither TANC, nor any other party under contract with BPA, should be required to presume that BPA will breach a contract before it actually does so. TANC should be entitled, if not required, to assume that BPA will abide by its contractual obligations absent a decision or action by BPA which expressly repudiates its contractual obligations, itself constitutes a breach, or inevitably will result in a breach.

B. Conflict Among Ninth Circuit Cases Regarding The Ninth Circuit's Jurisdiction Of Breach Of Contract Claims Against BPA Does Warrant This Court's Review.

BPA argues that "claims of an intra-circuit conflict do not ordinarily warrant this Court's review", citing *Wisniewski v. United States*, 353 U.S. 901 (1957) (BPA Opposition, page 11). *Wisniewski* did not involve a fundamental conflict between two published decisions of the Eighth Circuit. Further, the issue in *Wisniewski's* – concerning the allowable contents of a liquor bottle – could arise in any of the circuits. Here, since under 16 U.S.C. § 839f(e)(5) the Ninth Circuit has exclusive jurisdiction over suits challenging final actions and decisions of BPA, it is highly unlikely that any circuit other than the Ninth Circuit (with the possible exception of the United States Court of Federal Claims) would rule on the issue of whether a suit

against BPA presents a claim for breach of contract or a challenge to a BPA administrative action or decision.

Conflict among decisions of the Ninth Circuit creates the same uncertainty among those with claims against BPA that intercircuit conflicts create among interested parties. The uncertainty caused by the present decision among those with claims against BPA is no less significant because the present decision conflicts with another decision of the Ninth Circuit rather than with a decision of another circuit.

Further, the Ninth Circuit's decision in this case does squarely conflict with *Gulf States Utilities Co. v. Alabama Power Co., et al.*, 824 F.2d 1465 (5th Cir. 1987). Although *Gulf States* did not involve BPA, the Court in that case properly held that a claim for the breach of contracts for the purchase and sale of electricity were not preempted by the Federal Power Act even though FERC had approved the contracts at issue (*Id.* at 1471-1472), and FERC has exclusive jurisdiction over interstate power rates (*Id.* at 1468).

C. The Present Case Does Present A Quintessential Breach Of Contract Case Against BPA Unlike The Many Cases Cited By BPA.

In the cases cited by BPA, unlike in the present case, the true nature of the claim *was* a challenge to a BPA administrative decision or action. Indeed, in most of those cases the issue was not a close one.

CP National Corporation v. Jura, 876 F.2d 745 (9th Cir. 1989) involved "a petition to review rate schedules enacted by the Bonneville Power Administration" and "a challenge [of] the 'availability charge' contained in the 1983 Priority Firm Power Rate Schedule". *Id.* at 746. Thus, that case clearly involved a challenge to a *rate* enacted by BPA, and has no relevance here.

In *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843 (9th Cir. 2001), the petitioners challenged a decision by BPA regarding which *rate* to be charged petitioners for their power purchases. Not even the petitioners, who filed

petitions for review of BPA's decision under 16 U.S.C. § 839f(e)(5), believed their claim was for breach of contract. Again, a case of no relevance.

In *M-S-R Public Power Agency v. Bonneville Power Admin.*, 297 F.3d 833 (9th Cir. 2002), petitioners challenged BPA's method for calculating excess federal power – clearly a challenge governed by 16 U.S.C. § 839f(e)(5). What is interesting about this case is the court's holding that the challenge to the timeliness of BPA's notices of excess federal power does sound in contract, and for that reason the Court Of Federal Claims, not the Ninth Circuit, has jurisdiction over these claims. The court noted that "BPA's obligation to provide notice arose from the parties' Sales Agreement; neither statute nor agency regulation requires notice". *Id.* at 841. Likewise, here, BPA's obligation to maintain 4800 MW of transfer capability arises from its Agreements with TANC, not from any statute or regulation. Further, BPA prepares excess power forecasts pursuant to BPA policies and decisions which were in turn adopted "to interpret and implement its excess federal power marketing authority under 16 U.S.C. § 832m". *Id.* at 837. Without question, the challenge to the timeliness of BPA's notices mounted in *M-S-R*, which the court held *was* grounded in contract, is far "less contractual" than the challenge being made by TANC, which the same court has held is *not* grounded in contract. The conflict broadens and deepens, and should be resolved by this Court.

In *Pacific Power & Light*, 795 F.2d 810 (9th Cir. 1986), appellants sought to enforce agreements which restricted the manner in which BPA could change its methodology for determining a utility's average cost, which in turn is used by BPA to determine subsidies to investor-owned utilities. This methodology is authorized by statute, 16 U.S.C. § 839c(c)(7), is subject to review and approval by FERC, and was formally adopted by FERC. *Id.* at 812. It almost goes without saying or further analysis, that any attempt to enforce a constraint – whether by contract or otherwise – on BPA's adoption or modification of this methodology would be a challenge to rate

making by BPA and the Court so held. There is a fundamental difference between the present case and the *Pacific Power* case. In the *Pacific Power* case the agreements restricted the manner in which BPA could change the methodology for calculating average cost, a BPA ratemaking activity authorized by, indeed required by, federal statute, and subject to FERC review and approval. In the present case, the Agreements do not restrict the manner in which BPA conducts activities which it is required or authorized by law to undertake. The Agreements do not pertain to BPA's statutory authority. They do not limit or direct the exercise of that authority. They do not prohibit BPA from participating in the Alturas Project or govern how, when, or whether BPA shall participate. In the Agreements BPA did not promise not to participate in the Alturas Intertie Project or any other project. The Agreements nowhere restrict interconnection with the Alturas Intertie Project or any other system. Such interconnections do not result in breach of the Agreements. Failure to maintain 4800 MW of transfer capacity - for whatever reason – does.

In *Puget Sound Energy, Inc. v. United States*, 47 Fed. Cl. 506 (2002), plaintiff expressly challenged BPA's application of a rate schedule "established on the record in the formal rate proceeding in which Puget participated, held pursuant to the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h" and adopted in a BPA Final Record Of Decision. *Id.* at 508. Not surprisingly, the court held that plaintiff's claim was a challenge to a BPA rate schedule, and was therefore governed by 16 U.S.C. § 839f(e)(5), and that that result was not altered by the fact that the rate schedule was incorporated in an agreement between plaintiff and BPA.

D. A Party In Contract With BPA Should Be Compelled To Challenge A BPA Decision Only When That Decision Will Interfere With BPA's Existing Contractual Obligations To That Party, But Not Simply When It Might.

BPA and the Ninth Circuit believe that a party on notice that a BPA decision *might*, under certain circumstances, interfere with BPA contractual obligations to that party should be compelled to challenge that decision within 90 days of its making. No case has ever so held and 16 U.S.C. § 839f indicates otherwise. 16 U.S.C. § 839f(i)(3) provides in part that "the Administrator shall furnish services including transmission . . . unless he determines such services cannot be furnished without substantial interference with . . . existing contractual obligations". Thus, when BPA decided to interconnect with the proposed Alturas Intertie Project, BPA must have determined that it could do so without substantially interfering with its existing contractual obligations to TANC under the Agreements. TANC agrees with that determination. There were and are a number of means by which such interference can be avoided. Among those are increasing the capacity of the Northwest Intertie and/or monitoring power flows to the Alturas Intertie Project.

IV. CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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